STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellant,

v

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY,

Appellee.
_____/

Supreme Court No.

Court of Appeals No. 340600

MPSC Case No. U-18197

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

MICHIGAN PUBLIC SERVICE COMMISSION'S APPLICATION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Rules

Regulations

STATEMENT OF JURISDICTION

This Court has jurisdiction over all appeals from decisions of the Court of Appeals. Const 1963, art 6, § 4; MCR 7.303(B)(1). Appellant Michigan Public Service Commission (MPSC or Commission) appeals the Court of Appeals' July 12, 2018 decision reversing the Commission's September 15, 2017 order in Case No. U-18197. *In re Reliability Plans of Electric Utilities for 2017–2021*, ___Mich App ___ (2018) (Docket No. 340600) (Attachment 1 to this Brief).

STATEMENT OF QUESTIONS PRESENTED

1. The public rightfully expects reliable energy to power their homes and businesses, and electric providers must have enough electric capacity to serve their customers. Some of this capacity must come from local generation, and the Legislature authorized the Commission to decide, by setting a local clearing requirement, how much should come from local generation. MCL 460.6w(8)(c). Did the Commission exceed its authority by setting a local clearing requirement for every utility service territory and requiring all electric providers in the territory to meet it?

Appellant MPSC's answer:	No.
Appellant Consumers' answer:	No.
Appellee ABATE's answer:	Yes.
Appellee Energy Michigan's answer:	Yes.
Court of Appeals' answer:	Yes.

STATUTE INVOLVED

MCL 460.6w – Section 6w of 2016 Public Act 341.

(1) If the appropriate independent system operator receives approval from the Federal Energy Regulatory Commission to implement a resource adequacy tariff that provides for a capacity forward auction, and includes the option for a state to implement a prevailing state compensation mechanism for capacity, then the commission shall examine whether the prevailing state compensation mechanism would be more cost-effective, reasonable, and prudent than the capacity forward auction for this state before the commission may order the prevailing state compensation mechanism to be implemented in any utility service territory in which the prevailing state compensation mechanism is not yet effective. Before the commission orders the implementation of the prevailing state compensation mechanism in 1 or more utility service territories, the commission shall hold a contested case hearing pursuant to chapter 4 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.271 to 24.287. The commission shall allow intervention by interested persons, alternative electric suppliers, and customers of alternative electric suppliers and the utility under consideration. At the conclusion of the proceeding, the commission shall make a finding for each utility service territory under consideration, based on clear and convincing evidence, as to whether or not the prevailing state compensation mechanism would be more cost-effective, reasonable, and prudent than the use of the capacity forward auction for this state in meeting the local clearing requirement and the planning reserve margin requirement. The contested case must be scheduled for completion by December 1 before the independent system operator's capacity forward auction for this state, and the commission's decision shall identify which utility service territories will be subject to the prevailing state compensation mechanism. If the commission implements the prevailing state compensation mechanism, it shall implement the prevailing state compensation mechanism for a minimum of 4 consecutive planning years unless such period conflicts with the federal tariff. The commission shall establish the charge as a capacity charge under subsection (3) and determine that charge consistent with the approved resource adequacy tariff of the appropriate independent system operator.

(2) If the appropriate independent system operator receives approval from the Federal Energy Regulatory Commission to implement a resource adequacy tariff that provides for a capacity forward auction, and does not include the option for a state to implement a prevailing state compensation mechanism for capacity, then the commission shall examine whether a state reliability mechanism established under subsection (8) would be more cost-effective, reasonable, and prudent than the capacity forward auction for this

state before the commission may order the state reliability mechanism to be implemented in any utility service territory. Before the commission orders the implementation of the state reliability mechanism in 1 or more utility service territories, the commission shall hold a contested case hearing pursuant to chapter 4 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.271 to 24.287. The commission shall allow intervention by interested persons, alternative electric suppliers, and customers of alternative electric suppliers and the utility under consideration. At the conclusion of the proceeding, the commission shall make a finding for each utility service territory under consideration, based on clear and convincing evidence, as to whether or not the state reliability mechanism would be more cost-effective, reasonable, and prudent than the use of the capacity forward auction for this state in meeting the local clearing requirement and the planning reserve margin requirement. The contested case must be scheduled for completion by December 1 before the independent system operator's capacity forward auction for this state, and the commission's decision shall identify which utility service territories will be subject to the state reliability mechanism. If, by September 30, 2017, the Federal Energy Regulatory Commission does not put into effect a resource adequacy tariff that includes a capacity forward auction or a prevailing state compensation mechanism, then the commission shall establish a state reliability mechanism under subsection (8). The commission may commence a proceeding before October 1 if the commission believes orderly administration would be enabled by doing so. If the commission implements a state reliability mechanism, it shall be for a minimum of 4 consecutive planning years beginning in the upcoming planning year. A state reliability charge must be established in the same manner as a capacity charge under subsection (3) and be determined consistent with subsection (8).

(3) After the effective date of the amendatory act that added section 6t, the commission shall establish a capacity charge as provided in this section. A determination of a capacity charge must be conducted as a contested case pursuant to chapter 4 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.271 to 24.287, after providing interested persons with notice and a reasonable opportunity for a full and complete hearing and conclude by December 1 of each year. The commission shall allow intervention by interested persons, alternative electric suppliers, and customers of alternative electric suppliers and the utility under consideration. The commission shall provide notice to the public of the single capacity charge as determined for each territory. No new capacity charge is required to be paid before June 1, 2018. The capacity charge must be applied to alternative electric load that is not exempt as set forth under subsections (6) and (7). If the commission elects to implement a capacity forward auction for this state as set forth in subsection (1) or (2), then a capacity charge shall not apply

beginning in the first year that the capacity forward auction for this state is effective. In order to ensure that noncapacity electric generation services are not included in the capacity charge, in determining the capacity charge, the commission shall do both of the following and ensure that the resulting capacity charge does not differ for full service load and alternative electric supplier load:

(a) For the applicable term of the capacity charge, include the capacity-related generation costs included in the utility's base rates, surcharges, and power supply cost recovery factors, regardless of whether those costs result from utility ownership of the capacity resources or the purchase or lease of the capacity resource from a third party.

(b) For the applicable term of the capacity charge, subtract all non-capacity-related electric generation costs, including, but not limited to, costs previously set for recovery through net stranded cost recovery and securitization and the projected revenues, net of projected fuel costs, from all of the following:

(i) All energy market sales.

(ii) Off-system energy sales.

(iii) Ancillary services sales.

(iv) Energy sales under unit-specific bilateral contracts.

(4) The commission shall provide for a true-up mechanism that results in a utility charge or credit for the difference between the projected net revenues described in subsection (3) and the actual net revenues reflected in the capacity charge. The true-up shall be reflected in the capacity charge in the subsequent year. The methodology used to set the capacity charge shall be the same methodology used in the true-up for the applicable planning year.

(5) Not less than once every year, the commission shall review or amend the capacity charge in all subsequent rate cases, power supply cost recovery cases, or separate proceedings established for that purpose.

(6) A capacity charge shall not be assessed for any portion of capacity obligations for each planning year for which an alternative electric supplier can demonstrate that it can meet its capacity obligations through owned or contractual rights to any resource that the appropriate independent system operator allows to meet the capacity obligation of the electric provider. The preceding sentence shall not be applied in any way that conflicts with a federal resource adequacy tariff, when applicable. Any electric provider that

has previously demonstrated that it can meet all or a portion of its capacity obligations shall give notice to the commission by September 1 of the year 4 years before the beginning of the applicable planning year if it does not expect to meet that capacity obligation and instead expects to pay a capacity charge. The capacity charge in the utility service territory must be paid for the portion of its load taking service from the alternative electric supplier not covered by capacity as set forth in this subsection during the period that any such capacity charge is effective.

(7) An electric provider shall provide capacity to meet the capacity obligation for the portion of that load taking service from an alternative electric supplier in the electric provider's service territory that is covered by the capacity charge during the period that any such capacity charge is effective. The alternative electric supplier has the obligation to provide capacity for the portion of the load for which the alternative electric supplier has demonstrated an ability to meet its capacity obligations. If an alternative electric supplier ceases to provide service for a portion or all of its load, it shall allow, at a cost no higher than the determined capacity charge, the assignment of any right to that capacity in the applicable planning year to whatever electric provider accepts that load.

(8) If a state reliability mechanism is required to be established under subsection (2), the commission shall do all of the following:

(a) Require, by December 1 of each year, that each electric utility demonstrate to the commission, in a format determined by the commission, that for the planning year beginning 4 years after the beginning of the current planning year, the electric utility owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the appropriate independent system operator, or commission, as applicable.

(b) Require, by the seventh business day of February each year, that each alternative electric supplier, cooperative electric utility, or municipally owned electric utility demonstrate to the commission, in a format determined by the commission, that for the planning year beginning 4 years after the beginning of the current planning year, the alternative electric supplier, cooperative electric utility, or municipally owned electric utility owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the appropriate independent system operator, or commission, as applicable. One or more municipally owned electric utilities may aggregate their capacity resources that are located in the same local resource zone to meet the requirements of this subdivision. One or more cooperative electric utilities may aggregate their capacity resources that are located in the same local resource zone to meet the requirements of this subdivision. A cooperative or municipally owned electric utility may meet the requirements of this

subdivision through any resource, including a resource acquired through a capacity forward auction, that the appropriate independent system operator allows to qualify for meeting the local clearing requirement. A cooperative or municipally owned electric utility's payment of an auction price related to a capacity deficiency as part of a capacity forward auction conducted by the appropriate independent system operator does not by itself satisfy the resource adequacy requirements of this section unless the appropriate independent system operator can directly tie that provider's payment to a capacity resource that meets the requirements of this subsection. By the seventh business day of February in 2018, an alternative electric supplier shall demonstrate to the commission, in a format determined by the commission, that for the planning year beginning June 1, 2018, and the subsequent 3 planning years, the alternative electric supplier owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the appropriate independent system operator, or commission, as applicable. If the commission finds an electric provider has failed to demonstrate it can meet a portion or all of its capacity obligation, the commission shall do all of the following:

(i) For alternative electric load, require the payment of a capacity charge that is determined, assessed, and applied in the same manner as under subsection (3) for that portion of the load not covered as set forth in subsections (6) and (7). If a capacity charge is required to be paid under this subdivision in the planning year beginning June 1, 2018 or any of the 3 subsequent planning years, the capacity charge is applicable for each of those planning years.

(ii) For a cooperative or municipally owned electric utility, recommend to the attorney general that suit be brought consistent with the provisions of subsection (9) to require that procurement.

(iii) For an electric utility, require any audits and reporting as the commission considers necessary to determine if sufficient capacity is procured. If an electric utility fails to meet its capacity obligations, the commission may assess appropriate and reasonable fines, penalties, and customer refunds under this act.

(c) In order to determine the capacity obligations, request that the appropriate independent system operator provide technical assistance in determining the local clearing requirement and planning reserve margin requirement. If the appropriate independent system operator declines, or has not made a determination by October 1 of that year, the commission shall set any required local clearing requirement and planning reserve margin requirement, consistent with federal reliability requirements.

(d) In order to determine if resources put forward will meet such federal reliability requirements, request technical assistance from the appropriate independent system operator to assist with assessing resources to ensure that any resources will meet federal reliability requirements. If the technical assistance is rendered, the commission shall accept the appropriate independent system operator's determinations unless it finds adequate justification to deviate from the determinations related to the qualification of resources. If the appropriate independent system operator declines, or has not made a determination by February 28, the commission shall make those determinations.

(9) The attorney general or any customer of a municipally owned electric utility or cooperative electric utility may commence a civil action for injunctive relief against that municipally owned electric utility or cooperative electric utility if the municipally owned electric utility or cooperative electric utility fails to meet the applicable requirements of subsection (8)(b). The attorney general or customer shall commence an action under this subsection in the circuit court for the county in which the principal office of the municipally owned electric utility or cooperative electric utility is located. The attorney general or customer shall not file an action under this subsection unless the attorney general or customer gives the municipally owned electric utility or cooperative electric utility at least 60 days' written notice of the intent to sue, the basis for the suit, and the relief sought. Within 30 days after the municipally owned electric utility or cooperative electric utility receives written notice of the intent to sue, the municipally owned electric utility or cooperative electric utility and the attorney general or customer shall meet and make a good-faith attempt to determine if there is a credible basis for the action. The municipally owned electric utility or cooperative electric utility shall take all reasonable and prudent steps necessary to comply with the applicable requirements of subsection (8)(b) within 90 days after the meeting if there is a credible basis for the action. If the parties do not agree as to whether there is a credible basis for the action, the attorney general or customer may proceed to file the suit.

(10) The commission shall adjust the dates under this section if needed to ensure proper alignment with the appropriate independent system operator's procedures and requirements. However, any changes to the dates in this section must ensure that providers still meet applicable reliability requirements. The commission shall not permit a capacity charge to be assessed under this section for any year in which it has elected the capacity forward auction instead of the prevailing state compensation mechanism or the state reliability mechanism.

(11) Nothing in this act shall prevent the commission from determining a generation capacity charge under the reliability assurance agreement, rate

schedule FERC No. 44 of the independent system operator known as PJM Interconnection, LLC, as approved by the Federal Energy Regulatory Commission in docket no. ER10-2710 or similar successor tariff.

(12) As used in this section:

(a) "Appropriate independent system operator" means the Midcontinent Independent System Operator.

(b) "Capacity forward auction" means an auction-based resource adequacy construct and the associated tariffs developed by the appropriate independent system operator for at least a portion of this state for 3 years forward or more.

(c) "Electric provider" means any of the following:

(i) Any person or entity that is regulated by the commission for the purpose of selling electricity to retail customers in this state.

(ii) A municipally owned electric utility in this state.

(iii) A cooperative electric utility in this state.

(iv) An alternative electric supplier licensed under section 10a.

(d) "Local clearing requirement" means the amount of capacity resources required to be in the local resource zone in which the electric provider's demand is served to ensure reliability in that zone as determined by the appropriate independent system operator for the local resource zone in which the electric provider's demand is served and by the commission under subsection (8).

(e) "Planning reserve margin requirement" means the amount of capacity equal to the forecasted coincident peak demand that occurs when the appropriate independent system operator footprint peak demand occurs plus a reserve margin that meets an acceptable loss of load expectation as set by the commission or the appropriate independent system operator under subsection (8).

(f) "Planning year" means June 1 through the following May 31 of each year.

(g) "Prevailing state compensation mechanism" means an option for a state to elect a prevailing compensation rate for capacity consistent with the requirements of the appropriate independent system operator's resource adequacy tariff.

(h) “State reliability mechanism” means a plan adopted by the commission in the absence of a prevailing state compensation mechanism to ensure reliability of the electric grid in this state consistent with subsection (8).

INTRODUCTION

This complex utility regulatory appeal threatens a basic public interest in reliable energy, as well as an entire body of administrative law surrounding legislatively delegated authority. Through its July 12, 2018 published opinion, the Court of Appeals ruled that Act 341 of 2016 did not grant the Commission clear and unmistakable authority to require electric providers to use local generation resources to meet a portion of their customers' electric capacity needs. Although the court acknowledged that the Commission has authority to set a local clearing requirement encouraging providers to use local resources, it held that the Commission could not apply this requirement to electric providers. This is not only clearly erroneous under MCR 7.305(B)(5), but it also hinders the Commission's ability to protect the public's interest in a reliable electric grid. It also threatens the delicate balance that exists between legislatively delegated authority and the executive branch's execution of that authority.

The Court of Appeals' opinion undermines Act 341's purpose, which is to "ensure reliability of the electric grid in this state." MCL 460.6w(12)(h); accord MCL 460.6w(12)(d). Although the court limited its opinion to alternative electric suppliers, if the court's reasoning is extended to regulated electric utilities, it would free them from complying with the local clearing requirement as well. Equally as troubling is the possibility that the court's reasoning (although it was limited to the local clearing requirement) could be used to free electric providers from meeting the planning reserve margin requirement. This is the total electric demand each provider must meet in a given year to ensure reliability, including an extra cushion

necessary to withstand hotter-than-normal weather or equipment failures that take power plants or transmission lines out of service. Without the ability to apply a local clearing requirement or a planning reserve margin requirement, the Commission would be powerless to ensure that electric providers have the local capacity they need to meet their customers' demand. This is an issue of significant public interest under MCR 7.305(B)(2) that this Court should review.

Besides undermining Act 341's purpose, the Court of Appeals' opinion would also hamper the Legislature's ability to effectively delegate its authority by requiring it to tell administrative agencies every factor they must consider in exercising their discretion. This runs counter to a long line of precedent that allows the Legislature to delegate authority and discretion to an agency, as long as it includes standards that "are as reasonably precise as the subject matter requires or permits." *Department of Natural Resources v Seamen*, 396 Mich 299, 309 (1976) (quotation marks and citation omitted). This is a legal principle of major significance to the State's jurisprudence under MCR 7.305(B)(3), and this Court should protect this body of law.

STATEMENT OF FACTS AND PROCEEDINGS

Context is as critical to understanding language in the law as it is to understanding a set of facts. So, it is no surprise that Act 341, Section 6w, must be viewed holistically and cannot properly be understood in isolation. Like the language in the law itself, the legislative history, if it is considered at all, should also be viewed as a whole. When the Legislature approved Section 6w, it explicitly accounted for proceedings before the Federal Energy Regulatory Commission (FERC) and actions being taken by the Midcontinent Independent System Operator (MISO) to support state efforts to ensure that they have access to enough electric generation capacity to keep the lights on (i.e, to ensure resource adequacy). The Legislature intended Section 6w to complement these efforts and to be a backstop should FERC's and MISO's efforts fall short. Section 6w must be understood in this context and, even more importantly, in the context of the Legislature's overall purpose to promote the reliability of the State's electric grid.

MISO's capacity construct encourages electric providers to use local electric generation to meet demand.

When the Legislature drafted Act 341, MISO was in the process of reforming its capacity market[1] and reevaluating federal electric reliability requirements.

[1] The capacity market, or auction, allows buyers and sellers to exchange electric generating capacity on an annual basis through a centralized market administered by MISO, the FERC-regulated regional transmission organization for the Midcontinent region. As part of this FERC-approved system, there are also options available for suppliers to meet capacity requirements for the upcoming year outside the centralized market by demonstrating to MISO they have enough capacity; under this option, the supplier must secure a minimum amount of its capacity resources from the local area (generally, State boundary) to meet its proportional

MISO is the gatekeeper for Michigan's and other Midcontinental states' transmission systems and is instrumental to safeguarding the electric grid against rolling blackouts and prolonged outages. States are responsible for ensuring that their electric providers have enough capacity in the long run to serve customers, but MISO runs the annual market that electric providers and market participants use to buy and sell capacity and energy.[2] In this marketplace, resources are bought and sold "in the zones where they provide the most benefit." MISO, *Resource Adequacy*, at https://www.misoenergy.org/planning/resource-adequacy/#t=10&p=0&s=FileName&sd=desc (last visited August 15, 2018). While capacity supplies may be obtained from across a broad region, MISO's market construct emphasizes the importance of locating resources in the local resource zone where they will be used or, if outside the zone, having firm access to transmission into the zone.

MISO imposes a local clearing requirement on electric providers, including alternative electric suppliers, either directly or indirectly as discussed below. Act 341 defines a local clearing requirement as "the amount of capacity resources required to be in the local resource zone in which the electric provider's demand is served . . . as determined by the appropriate independent system operator . . . and

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share of the zone's local clearing requirement. The capacity market is separate from the energy market. Capacity is the ability to produce energy. That is, if adequate supplies of capacity are arranged to meet demand for electricity, including a cushion of excess supplies, there should be enough electricity produced at any given moment.

[2] Act 341 defines "electric providers" to include Michigan's regulated electric utilities, municipal and cooperative electric utilities in this State, and alternative electric suppliers. MCL 460.6w(12)(c).

by the commission under subsection (8)." MCL 460.6w(12)(d). MISO is the "appropriate independent system operator," MCL 460.6w(12)(a), and it annually determines the local clearing requirement for Zone 7, which is Michigan's Lower Peninsula. The local clearing requirement is intended to "ensure reliability in that zone." *Id.*

To set the local clearing requirement, MISO first determines how much capacity a local resource zone would need if the zone were an island that could not rely on imports to offset its capacity needs. (9/15/17 Order, p 7, F# 125,[3] Attachment 2 to this Brief.) This overall capacity need is referred to as the local reliability requirement. MISO then applies a capacity import limit, which it uses to capture imports into the zone after accounting for the transmission system's constraints. (*Id.*) Finally, MISO subtracts the capacity import limit from the local reliability requirement to calculate the local clearing requirement. (*Id.*) Through this formula, the local clearing requirement allows imports, but it does not allow more imports than the physical infrastructure can tolerate.[4] (MISO Tariff § 68A.6.)

MISO's current resource adequacy construct is designed to ensure that each zone satisfies its local clearing requirement.[5] MISO acknowledges that "[t]he

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[3] The record in this matter appears in the Michigan PSC's electronic docket. To assist the Court, this brief includes the filing number (F#) where cited documents can be found.

[4] The formula also accounts for exports, but exports are not important to this appeal.

[5] MISO serves electric providers in 15 US states, one Canadian province, and the City of New Orleans. It is divided into ten different zones. See John Harmon, MISO's Resource Adequacy Overview, Presentation (June 8, 2017), p 3, at

physical location of generation resources is an important consideration in MISO's resource adequacy processes." (MISO Comments, p 3, F# 109.) Under MISO's capacity construct, there are three ways for electric providers to meet their capacity needs: the first is through the planning resource auction, the second is the fixed resource adequacy plan, and the third is a capacity deficiency charge. (MISO Tariffs §§ 69A.7.1, 69A.9, and 69A.10.[6]) The local clearing requirement is initially imposed on the zone as a whole, but as discussed below, location requirements are also incorporated into each option just described.[7]

For the first option, although electric providers can purchase power from outside the zone to meet their capacity need through the annual auction, if enough providers in a zone do this and there is not enough local supply, the zone will not meet its local clearing requirement and each provider in the zone will be penalized in the form of higher charges. Providers who buy from MISO's planning resource auction must obtain enough zonal resource credits in the auction to individually meet their capacity need (MISO's term for this capacity need is the "planning reserve margin requirement," which is the provider's typical annual peak demand

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https://www.michigan.gov/documents/mpsc/6-8-2017_MI_Resource_Adequacy_Overview_573222_7.pdf.

[6] MISO's Tariffs can be found at https://www.misoenergy.org/legal/tariff/ (last visited on August 23, 2018).

[7] There is a fourth option referred to as self-scheduling, but it is essentially a variation of the planning resource auction option. Self-scheduling allows a provider to sell their owned and contracted for generation into and buy it back from the auction at a zero bid. To self-schedule, the resources must come from within the zone where they are being bought and sold.

plus a planning reserve margin). *Midcontinent Indep Sys Operator, Inc,* 146 FERC ¶ 61,180 (2014). Zonal resource credits are planning resources (e.g., provider-owned generation or generation acquired by contract) that are converted into credits on a one-for-one basis for each megawatt of generation. Once converted, electric providers can buy these credits in the planning resource auction and use the credits to individually meet their planning reserve margin requirement.[8] *Id*.

If in meeting their planning reserve margin requirement, electric providers in a MISO zone, like Michigan's Lower Peninsula, do not collectively meet the zone's local clearing requirement, MISO charges those who bought capacity in the planning resource auction the cost of new entry (CONE) rather than the auction clearing price. (MISO Tariff § 69A.7.1.) Historically, CONE is vastly higher than the auction clearing price.[9] So if the local resource zone goes to CONE—i.e., does not collectively purchase enough zonal resource credits from resources physically located in the zone to meet its local clearing requirement—alternative electric suppliers and anyone else who bought credits in the auction will pay higher

[8] Each electric provider must meet an individualized planning reserve margin requirement to account for the loss-of-load expectation, which is the number of days per year when there is not enough generation capacity to serve demand. MCL 460.6w(8)(c) and (12)(e). MISO sets the loss-of-load expectation at one day in ten years, meaning that the planning reserve margin it sets will not allow capacity to fall short of demand more than once in every ten years.

[9] For example, the 2017/2018 planning resource auction resulted in an auction clearing price of $1.50 per megawatt day, while CONE was $260.00 per megawatt day for same period. MISO, *2017/2018 Planning Resource Auction Results*, April 14, 2017, p 8, at https://cdn.misoenergy.org/2017-2018%20Planning%20Resource%20Adequacy%20Results87196.pdf (last visited on August 15, 2018).

charges.[10] These higher charges will be assessed based on each provider's pro rata share of capacity in the zone. For all practical purposes, this mechanism imposes the local clearing requirement on individual alternative electric suppliers and other providers in each zone by charging them more if they are buying capacity in the auction and if they cannot collectively meet the zone's local clearing requirement.

For the second option—opting out of the auction and instead submitting a fixed resource adequacy plan—electric providers must meet their share of the local clearing requirement. According to MISO's tariffs, providers choosing to rely on a fixed resource adequacy plan must forecast their planning reserve margin requirement for the planning year, identify the zonal resource credits that they will use to meet this requirement, and identify the credits they will use to meet their "load ratio share of the LCR [local clearing requirement] for each LRZ [local resource zone]." (MISO Tariff § 69A.9.) Using this second option removes a provider from the planning resource auction and relieves it of the consequences of the zone's failure to meet the local clearing requirement. Under this option, the local clearing requirement for the upcoming year is directly assigned upfront to the electric provider.

The third option also incorporates the local clearing requirement. According to MISO, an electric provider may avoid meeting its planning reserve margin requirements through the planning resource auction by paying MISO a capacity

[10] To put it into an equation, resources in the fixed resource adequacy plan (the second option discussed below) + the total zonal resource credits ≥ the local clearing requirement in order to avoid paying CONE (i.e., higher charges).

deficiency charge. MISO Business Practice Manual Resource Adequacy, BPM-011-r17 § 5.7 (effective August 25, 2017), at https://www.misoenergy.org/legal/business-practice-manuals/. The charge is equal to the electric provider's capacity deficiency (the amount of its planning reserve margin requirement not being met) multiplied by 2.748 times CONE for the local resource zone.[11] MISO then distributes these revenues on a pro rata basis to other providers within the same local resource zone who did not pay the capacity deficiency charge.[12] In this way, an electric provider that pays a capacity deficiency charge essentially pays a penalty for not contributing to the zone's local clearing requirement.

Whether through the auction, fixed resource plan, or the capacity deficiency charge, the local clearing requirement under MISO's tariff is ultimately applied to electric providers.

FERC and MISO respect states' authority over their electric generation resources.

The Federal Power Act acknowledges that states have exclusive jurisdiction over resource adequacy. 16 USC 824; See generally *Hughes v Talen Energy Mktg*, 136 S Ct 1288, 1299 (2016) (reaffirming that states retain traditional authority over in-state generation under federal law). States may take steps to ensure that electric providers in their jurisdictions have enough electric capacity to serve their customers. And these states do not infringe on FERC's authority to regulate

[11] *Id.*

[12] *Id.*

interstate energy sales, unless they disregard FERC-set wholesale rates. *Hughes*, 136 S Ct at 1299. What few resource adequacy requirements FERC has are determined by regional transmission operators. For most of Michigan, MISO is the regional transmission operator. MISO's reliability standard is based on a "loss-of-load expectation" of one day in ten years, meaning that it requires electric providers to have enough capacity so that capacity will not fall short of demand more than once every ten years. The total capacity required for each provider is the planning reserve margin requirement, and for the 2017–2018 planning year, MISO has set it at 15.8% above each provider's typical peak demand.

Although MISO has this basic reliability standard, it has explained many times that it expects states to take primary responsibility for ensuring long-term resource adequacy. (E.g., MISO Comments, p 4, F# 109.) According to MISO, "State and local regulatory authorities continue to be responsible for reviewing the prudence of resource decisions that are subject to their individual jurisdictions, including investment in generation facilities to meet long-term planning reserve requirements." *In re MISO*, FERC Docket No. ER17-298, 11/1/16 MISO Transmittal Letter, p 2. Indeed, MISO has no long-term planning resource requirements, instead leaving these requirements entirely to the states; MISO only has a single year annual resource adequacy construct, which is designed to complement states' resource adequacy requirements. (MISO Tariff, Module E-1 § 68A.)

The Michigan Legislature considers different ways to promote resource adequacy.

On July 1, 2015, Senator Nofs introduced Senate Bill 437 to address concerns that there could be a capacity shortfall in Michigan in the near future. Among other things, the bill required alternative electric suppliers to prove annually that they had enough generating capacity for the next three years or longer, depending on the circumstances. (2015 SB 437.) Not only did alternative electric suppliers have to show they would have enough capacity, they had to show that their capacity resources were either physically located in the local resource zone or that they had contracted transmission capacity to import capacity into the zone. They also had to show that they were not relying on MISO's planning resource auction for more than five percent of their capacity requirements. (Senate Legislative Analysis, July 14, 2015, p 13.)

Senate Bill 437 required each electric provider to meet their own customers' demand and a proportional share of the zone's local clearing requirement. Senate Bill 437 was changed several times, as the Senate considered different ideas about how much generation should come from local resources and who should be required to use local capacity under what circumstances.[13] Several versions of the bill also included a generation capacity charge (not to be confused with the capacity charge

[13] Under Substitute S-2, for example, electric providers would have to meet 100% of their proportional share of local clearing requirement (based on their customers' contributions to the zone's overall demand). *Id.* Alternative electric suppliers would have to meet 50% of their proportional share under ordinary conditions but 100% if the Commission projected a local shortfall. Under Substitute S-4, all of these percentages changed.

included the final version) that utility customers who switched to retail choice would have to pay for ten years.

Senator Nofs' bill languished in committee for nearly a year.

MISO proposes a new resource adequacy construct.

On November 1, 2016, MISO asked FERC to let it change its electric resource adequacy plan for its local resource zones that have retail choice. *In re MISO*, FERC Docket No. ER17-298, 11/1/16 MISO Transmittal Letter, p 1. MISO explained that "[w]hile traditionally-regulated States typically have regulatory authority to respond to changing conditions, Competitive Retail Areas [like Illinois and Michigan] in the MISO footprint . . . do not have a mechanism to address long-term resource adequacy." *Id*. at 2. MISO had assessed capacity resources in these areas and found that they were at high risk of serious capacity shortfalls, particularly in restructured jurisdictions with competitive retail choice. *Id.* MISO projected that, as early as 2018, MISO Zone 7 (Michigan's Lower Peninsula) would have a 400 MW capacity shortfall, and by 2021 it would be even worse. *Id*. at 2–3, 15 (citing Tab F, OMS-MISO Resource Adequacy Survey).

MISO's concerns led it to assemble a taskforce of interested stakeholders and ultimately to propose what it called a competitive retail solution. MISO's proposal gave electric providers several options. One option was a new forward resource auction that allowed electric providers in Illinois and Michigan to purchase capacity three years before a planning year. *In re MISO*, FERC Docket No. ER17-298, 11/1/16 MISO Transmittal Letter, p 5. A second option allowed providers to rely on

their own resources (and resources under contract) in a "forward fixed resource adequacy plan" that participants could submit instead of participating in the auction. Finally, states could institute a "prevailing state compensation mechanism" that would also be an alternative to the auction but would give states more control. *Id*. at 6.

Using the prevailing state compensation method, states could opt their entire retail choice load out of the forward resource auction for four consecutive planning years and take it upon themselves to safeguard long-term resource adequacy. *In re MISO*, FERC Docket No. ER17-298, 11/1/16 MISO Transmittal Letter, p 391 (Tab D at 69A.1.12.1(b)(i)). For alternative electric suppliers unable to show that they would have enough capacity to meet their customers' needs in four years, either with their own generation or generation that they have under contract, states could appoint another electric provider (like a traditional rate-regulated utility) to supply capacity on their behalf. States could also approve a rate of compensation (i.e., a capacity charge) for the capacity being supplied. *Id.* at 24. Importantly, the prevailing state compensation mechanism, as proposed to FERC, required individual electric providers to meet their proportional share of the local clearing requirement.

In response to MISO's proposal, the Legislature passes Senate Bill 437, which becomes Act 341.

Nine days after MISO proposed its competitive retail solution to FERC, the full Senate adopted Substitute S-7, passed it, and sent it to the House of Representatives for consideration. (2016 Senate Journal 1784–1785, 1787.) Unlike the previous versions of the bill, S-7 added new language that incorporated MISO's proposal, attempting to merge the requirements of MISO's competitive retail solution with the Legislature's generation capacity charge. If FERC did not approve MISO's proposal, then this charge would apply to all customers (including retail choice customers), and they would have to pay it for ten years "if, as a result of the additional required capacity, the utility has to make a significant acquisition or investment in incremental generation capacity resources." (2016 Senate Bill 437, S-7, § 10a(1)(I).) If not, the generation capacity charge would last for just four years. (*Id.*)

Within a month of receiving the bill, the House adopted Substitute H-4, which was the version that ultimately became law (with a few minor amendments). H-4 completed the process the Senate began with S-7, abandoning the generation capacity charge as it was originally envisioned and adopting language closely mirroring MISO's competitive retail solution. Under H-4, if FERC adopted MISO's competitive retail solution, the Commission could choose between the forward resource auction or the prevailing state compensation mechanism. If FERC rejected MISO's proposal, however, the Commission would have to put essentially the same

compensation mechanism into place, but it would be called a state reliability mechanism. (2016 Senate Bill 437, H-4, §§ 6w(1), (2), (3) and (8).)

The Commission implements Act 341, Section 6w, in accordance with statutory requirements.

After FERC rejected MISO's competitive retail solution, *Midcontinent Indep Sys Operator, Inc,* 158 FERC ¶ 61,128 (2017), the Commission opened a case pursuant to Section 6w(2) to create a state reliability mechanism. *In re Docket to Implement Section 6w of 2016 PA 341 for Consumers Energy Co's Service Territory*, MPSC Case No. U-18239, *et al*., 3/10/17 Order, p 19. In that case, the Commission directed its Staff to convene a technical conference in Case No. U-18197 to resolve issues that could be resolved outside of a contested case. *Id.* at 20. Staff held several public technical conferences, but the stakeholders could not agree on three issues, one of which is relevant to this appeal. That issue is whether there should be a location requirement (i.e., local clearing requirement) for resources used to satisfy capacity obligations, and if so, whether it should be applied to individual electric providers or to the local resource zone as a whole. (5/11/17 Order, p 5, F# 52.)

On this issue, after hearing comments and legal arguments from interested parties, the Commission found that Section 6w required it to set a location requirement. (6/15/17 Order, p 7, F# 85.) And since capacity obligations are only referred to in the statute in terms of individual obligations, the Commission found that the Legislature must have intended to impose the requirement on an

individual basis. (6/15/17 Order, pp 8-10, F# 85.) The Commission did not set the capacity requirement; it instead requested "technical assistance from MISO in determining capacity obligations as part of this process." (*Id.* at 11.) Later, in the September 15, 2017 order on appeal, the Commission reiterated its earlier conclusion that Section 6w requires it to set a local clearing requirement and apply it to individual electric providers. But the Commission again declined to allocate the requirement to individual providers for the 2018–2019 through 2021–2022 planning years, instead opening a docket to allocate the local clearing requirement for the 2022–2023 planning year and later years. See *In re Forward Locational Requirement*, MPSC Case No. U-18444, 11/21/17 Order. In that case, it would also set the planning reserve margin requirement for the 2022–2023 planning year. *Id.*

ABATE and Energy Michigan appealed the Commission's September 15th order.

The Court of Appeals reverses the Commissions' Order.

The Court of Appeals held that the Commission lacked authority to impose a local clearing requirement on alternative electric suppliers. Critical to its holding was its belief that "MISO permits an alternative electric supplier to meet its capacity obligations, including the local clearing requirement, by owning or contracting for capacity resources located outside the applicable local resource zone" and that MISO "does not require each alternative electric supplier to demonstrate a proportionate share of the local clearing requirement." *In re Reliability Plans of Electric Utilities*, ___Mich App___ at ___; slip op at 10. The court acknowledged that

Section 6w(8)(c) "requires the MPSC to determine the local clearing requirement in order to determine capacity obligations." *Id.* But because "the MPSC is obligated to apply the local clearing requirement in a manner consistent with MISO" and because Section 6w(8)(c) "does not specifically authorize the MPSC to impose the local clearing requirement upon alternative electric suppliers individually," the court held that the Commission lacked authority to set a local clearing requirement for individual alternative electric suppliers. *Id.* The court did not discuss the penalty that MISO imposes should a local resource zone fail to meet its local clearing requirement or how this impacts individual alternative electric suppliers. Nor did the court acknowledge that MISO directly assigns and applies a proportional share of the local clearing requirement to electric providers that opt out of the auction—a process akin to the capacity demonstration requirements (planning reserve margin and local clearing requirement) under Section 6w.

The court recognized that Section 6w(8)(b) "allows cooperative and municipally owned electric utilities to 'aggregate their capacity resources that are located in the same local resource zone' for purposes of satisfying their capacity obligations," which includes a local clearing requirement. *In re Reliability Plans of Electric Utilities*, ___Mich App___ at ___; slip op at 11. But it nonetheless refused to conclude that the local clearing requirement would otherwise individually apply to these utilities and alternative electric suppliers. "[R]eaching this conclusion," the court held, "requires the inference that section 6w permits the MPSC to establish a

capacity obligation that includes an individual local clearing requirement contrary to that imposed by MISO." *Id.*

Ultimately, the court concluded that because it "must strictly construe the statutes that confer power upon the MPSC, and that power may not be inferred but instead must be conferred by 'clear and unmistakable language,' we conclude that MCL 460.6w does not authorize the MPSC to impose a local clearing requirement upon individual alternative electric suppliers." *In re Reliability Plans of Electric Utilities*, ___Mich App___ at ___; slip op at 11–12. Several times in its opinion the court said that Act 341 did not include "clear and unmistakable language" giving authority to the Commission to impose a local clearing requirement on alternative electric suppliers. *Id.* at 10, 11, 12.

The court went on to say that although it did not need to consider the legislative history, it supports the court's conclusion. The court noted that the Legislature considered a version of Act 341 that "impos[ed] the local clearing requirement upon individual alternative electric suppliers," and since the version that ultimately passed did not include this language, the Legislature must not have intended to give the Commission authority to do the same thing. *In re Reliability Plans of Electric Utilities*, ___Mich App___ at ___; slip op at 13–14. The court did not discuss the events that led to these legislative changes.

STANDARD OF REVIEW

Section 26(8) of the Railroad Act places a heavy burden of proof on parties appealing Commission orders to show, by clear and satisfactory evidence, that the

Commission's order is unlawful or unreasonable. MCL 462.26(8); accord *Antrim Resources v Pub Serv Comm*, 179 Mich App 603, 620 (1989) ("The standard of judicial review of a decision of the PSC is whether that decision is lawful and supported by competent, material and substantial evidence on the whole record."). The Michigan Supreme Court has explained how difficult it is to show that an order is unlawful or unreasonable. In *In re MCI Telecommunications Complaint*, 460 Mich 396, 427 (1999) (quotation omitted), the Court said that to find a Commission order unlawful "there must be a showing that the commission failed to follow some mandatory provision of the statute or was guilty of an abuse of discretion." Likewise, "The hurdle of unreasonableness is equally high. Within the confines of its jurisdiction, there is a broad range or 'zone' of reasonableness within which the PSC may operate." *Id.*

While an appellant always has the burden of proving that a Commission order is unlawful or unreasonable, courts may apply different standards of review when evaluating the appellant's arguments depending on the nature of the decision involved. *In re Rovas Complaint*, 482 Mich 90, 108–09 (2008) ("[C]ourts should carefully separate the different agency functions under consideration and apply the proper standard of review for each."). For example, in judicial or quasi-judicial cases where a hearing is required, the Commission's decision must be supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *Dowerk v Twp of Oxford*, 233 Mich App 62, 72 (1998). In these "substantial evidence" cases, courts should not substitute their judgment for the Commission's

factual findings or regulatory judgment. *Consumers Power Co v Pub Serv Comm*, 196 Mich App 687, 691 (1992). In other words, courts should defer to the Commission's findings of fact. *In re Rovas Complaint*, 482 Mich at 101 ("[A]n agency's findings of fact are entitled to deference by a reviewing court.").

By contrast, the Commission's legislative or quasi-legislative judgments may not be overturned unless the Commission exceeded its statutory authority or abused its discretion. See *In re Rovas Complaint*, 482 Mich at 100–101; see also *Coffman v State Board of Examiners in Optometry*, 331 Mich 582, 589–590 (1951). Because ratemaking is a legislative function, courts should defer to the Commission's ratemaking decisions and apply the abuse of discretion standard. See *Detroit Edison Co v Pub Serv Comm*, 264 Mich App 462, 471 (2004); see also *Coffman*, 331 Mich at 589–590. An abuse of discretion does not occur unless "an unprejudiced person considering the facts upon which the decision was made would say that there was no justification or excuse for the decision." *Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 254 (2005).

The Commission's statutory interpretations are subject to yet another standard. Although courts may not abdicate their judicial responsibility to interpret statutes by giving "unfettered deference" to an agency's statutory interpretation, an agency's statutory interpretation is nonetheless entitled to the "most respectful consideration" and should not be overturned without "cogent reasons." *In re Rovas Complaint*, 482 Mich at 93. In *In re Rovas*, the Michigan Supreme Court reaffirmed the *Boyer-Campbell Co v Fry* standard of review for

agencies' statutory interpretations. *Id*. at 103. Under *Boyer-Campbell Co*, while agency interpretations are not controlling, they are an aid, and courts should give them weight when construing doubtful or obscure laws that the agency administers. *Boyer-Campbell Co v Fry,* 271 Mich 282, 296–297 (1935). The *Boyer-Campbell Co* Court even held that agency interpretations are "sometimes deferred to when not in conflict with the indicated spirit and purpose of the legislature." *Id.*

The Court of Appeals did not apply the complete standard of review. Not only did the court place the burden of proof on the Commission to support its ratemaking decision and statutory interpretation, the court did not defer to the Commission's ratemaking decision or give respectful consideration to the Commission's interpretation of Act 341. Yet, the Commission's interpretation of Act 341 is the only one that is consistent with the Act's express purpose and fulfills all the Act's requirements. Under Act 341 of 2016, the purpose of a state reliability mechanism is to "ensure reliability of the electric grid in this state." MCL 460.6w(12)(h). The Commission's order advances that goal by ensuring that *all* electric providers contribute to the reliability of the electric grid in this State.

Because the Commission's order is "not in conflict with the indicated spirit and purpose of the legislature," the Court of Appeals should have deferred to the Commission's interpretation. See *Boyer-Campbell Co*, 271 Mich at 296–297.

ARGUMENT

I. This Court should grant leave under MCR 7.302(B)(2), (B)(3), and (B)(5) because the Legislature delegated authority to the MPSC to set a local clearing requirement and because applying the requirement to individual electric providers is consistent with Act 341's purpose, its plain language, legal precedent, and the public's interest.

Everyone agrees that the Legislature authorized the Commission to establish a local clearing requirement. Everyone also appears to agree that the Legislature did not expressly prohibit the Commission from imposing a local clearing requirement on individual electric providers. But because the Legislature supposedly did not, in clear and unmistakable language, give the Commission explicit authority to impose a local clearing requirement on alternative electric suppliers, ABATE and Energy Michigan convinced the Court of Appeals that the Commission lacks authority to do so. They did not consider that the Legislature also did not grant the Commission explicit authority to impose the local clearing requirement on electric utilities. This means, by their flawed reasoning, that the Commission also lacks authority to impose a local clearing requirement on electric utilities. This would leave only cooperative and municipal utilities subject to the local clearing requirement. This cannot be the correct interpretation because it runs counter to the primary purpose of Act 341, Section 6w, which is to promote the reliability of the State's electric grid.

This interpretation is not only clearly erroneous, it would erode a core constitutional principle. It would reshape the separation of powers by tampering with the Legislature's ability to delegate legislative authority to the executive

branch of government in clear and unmistakable language. According to ABATE and Energy Michigan, it is not enough to give the Commission authority to create a local clearing requirement, the Legislature must tell the Commission everyone the mechanism applies to and how to apply it. If this interpretation prevails, it would tip the scales of power in the judiciary's favor by giving it more control over the legislative and executive branches of government.

A. The Court of Appeals' opinion is clearly erroneous and will cause material injustice.

The Court of Appeals was wrong about the local clearing requirement as a matter of law and fact. In Act 341, the Legislature intended to promote the reliability of the State's electric grid, MCL 460.6w(12)(d), (h), and only the Commission's interpretation advances this goal by applying the Act's capacity obligations and local clearing requirement equitably to all electric providers. The Commission's interpretation is also the only one in keeping with MISO's actual practices, which are practical, factual realities that ABATE and Energy Michigan overlooked.

If not overturned, the Court of Appeals' decision will cause material injustice to municipal and cooperative electric utilities who would likely be the only utilities bound by the local clearing requirement.

1. The Court of Appeals is wrong as a matter of law.

The Court of Appeals' opinion does not honor the purpose of the statute, its plain language, or the statutory context.

a. The Commission's interpretation of Act 341 is the only one that is consistent with Act's purpose and plain language.

Interpreting the local clearing requirement to apply to individual electric utilities and alternative electric suppliers accomplishes Act 341's purpose by ensuring that providers have access to the capacity they need to serve their customers. "The primary goal of statutory interpretation is to give effect to the intent of the Legislature." *In re MCI Telecommunications Complaint*, 460 Mich at 411. "To do this, we first review the plain language of the statute itself. If the language is clear, no further construction is necessary or allowed to expand what the Legislature clearly intended to cover." *People v Koonce*, 466 Mich 515, 518 (2002). But if the meaning of a statute is in question, "[A] court must look to the object of the statute, the harm which it is designed to remedy, and apply a reasonable construction which best accomplishes the statute's purpose." *In re Forfeiture*, 432 Mich 242, 248 (1989). The intended purpose of a state reliability mechanism "is to *ensure reliability* of the electric grid in this state consistent with Section 6w(8)." MCL 460.6w(12)(h) (emphasis added). That is also the purpose of a local clearing requirement, which is defined as "the amount of capacity resources required to be in the local resource zone in which the electric provider's demand is served *to ensure reliability in that zone* . . . ." 460.6w(12)(d) (emphasis added).

The Commission's interpretation is also consistent with Act 341's plain language and its context. Context is critical in all circumstances, even when interpreting plain language. *Griffith v State Farm Mutual Auto Ins Co*, 472 Mich 521, 533 (2005) ("[T]he meaning of statutory language, plain or not, depends on

context."). The Act requires electric providers to demonstrate that they have enough capacity to serve their customers. MCL 460.6w(8)(a) and (b). As part of that capacity demonstration, the Commission can impose a local clearing requirement. MCL 460.6w(8)(c). Providers must meet this capacity obligation, and this obligation includes a local clearing requirement, so providers must also obviously meet the local clearing requirement when demonstrating that they have enough capacity to meet demand. This is the most straightforward interpretation of the statute, is consistent with its plain language, and harmonizes all of its provisions.

By contrast, ABATE and Energy Michigan's interpretation would render the local clearing requirement practically meaningless. They took the position, which the Court of Appeals' adopted, that the Commission cannot apply the local clearing requirement to alternative electric suppliers because Act 341 did not give the Commission this power in clear and unmistakable language. But their interpretation logically extends to other electric providers as well. The language requiring alternative electric suppliers to show that they have met their capacity obligations is identical, except for the timeframe, to the language requiring electric utilities to show they have met their capacity obligations. Compare MCL 460.6w(8)(a) with MCL 460.6w(8)(b).[14] These capacity obligations incorporate a

[14] Act 341 requires electric utilities to "*demonstrate to the commission, in a format determined by the commission*, that for the planning year beginning 4 years after the beginning of the current planning year, *the electric utility owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the appropriate independent system operator, or commission, as applicable.*" MCL

local clearing requirement that MISO or the Commission sets.[15] MCL 460.6w(8)(c). Given that Act 341 treats alternative electric providers' and electric utilities' capacity obligations essentially the same, it could easily be interpreted to exempt electric utilities from the local clearing requirement in the same way it was interpreted to exempt alternative electric suppliers from the requirement.

Thus, if the Court of Appeals' interpretation is applied evenhandedly to electric utilities in the same way it is applied to alternative electric suppliers, the Commission would not be able to apply the local clearing requirement to electric utilities either. Regulated electric utilities serve most of Michigan's electric customers, so most of the State would be exempt from the local clearing requirement. Worse, if the same reasoning was extended to the planning reserve margin requirement, the Commission would not be able to impose a planning reserve margin requirement on electric providers either. Like the local clearing requirement, although the Commission is authorized to set the planning reserve margin requirement, a court could hold that the Commission is not authorized in

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460.6w(8)(a) (emphasis added). The requirement for alternative electric suppliers mirrors this provision, except for the timeframe involved: "[A]n alternative electric supplier shall *demonstrate to the commission, in a format determined by the commission*, that for the planning year beginning June 1, 2018, and the subsequent 3 planning years, *the alternative electric supplier owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the appropriate independent system operator, or commission, as applicable.*" MCL 460.6w(8)(b) (emphasis added).

[15] The Commission has since, with MISO's input, established a method for setting the local clearing requirement for the 2022–2023 planning year and beyond. See *In re Forward Locational Requirement*, MPSC Case No. U-18444, 6/28/18 Order, pp 115–132.

clear and unmistakable language to impose it on individual electric providers. Preventing the Commission from doing so would eviscerate the heart of Act 341 by reducing the state reliability mechanism and capacity demonstration process to a mere formality and rendering the local clearing requirement and planning reserve margin requirement essentially meaningless.

The argument could stop here, but there is more. Besides Section 6w(8)(c), which authorizes the Commission to set a local clearing requirement, the requirement is mentioned elsewhere as well. Section 6w(8)(b), for example, allows cooperative utilities and municipal utilities to aggregate their resources to meet the local clearing requirement. This "clearly implies that these utilities would otherwise be required to meet the requirements on an individual basis." (9/15/17 Order, p 38.) And if these non-profit utilities are bound on an individual basis, it stands to reason that regulated electric utilities and alternative electric suppliers are individually bound as well. The Court of Appeals rejected this argument, not because it was an invalid deduction, but because in its view there was still no clear and unmistakable authority for the Commission to impose the local clearing requirement on individual alternative electric suppliers. *In re Reliability Plans of Electric Utilities*, ___Mich App at ___; slip op at 11–12.

In short, the Court of Appeals' interpretation would violate the rule of statutory construction that "[e]very word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory if at all possible." *Altman v Meridian Twp*, 439 Mich 623, 635 (1992), as modified on denial of reh'g.

Using their reasoning, although the Commission could set a local clearing requirement and planning reserve margin requirement, the requirements would not serve their intended purpose because the Commission could apply them only to cooperative and municipal utilities.

Taking all this together, the legislative intent, plain language, and context dictate that the local clearing requirement applies to all electric providers, including alternative electric suppliers.

b. The legislative history supports the Commission's interpretation.

The legislative history does not save ABATE's and Energy Michigan's flawed textual analysis. This is true for two reasons. First, as the Court of Appeals correctly acknowledged, courts "look outside the plain words of the statute only when ambiguity within the statute requires it, and we do not use legislative history to cloud clear statutory text." *In re Reliability Plans of Electric Utilities*, ___Mich App at ___; slip op at 12. In this case, the statutory language is clear, although not in the way ABATE, Energy Michigan, and the Court of Appeals believe, so there is no need to look outside the plain words of the statute. Second, if the legislative history is considered, it actually supports the Commission's interpretation. Previous versions of Senate Bill 437, which later became Act 341, included detailed methods to determine how much of an electric provider's capacity must come from local generation in MISO Zone 7 (i.e., Michigan's Lower Peninsula). Although these specific methods were ultimately removed, the location requirement was not

removed entirely. Instead, in Substitutes S-7 and H-4, the detailed methods (i.e., the prescriptive methods for setting and applying the local clearing requirement) were replaced with language that gave MISO and the Commission discretion to establish the local clearing requirement. This change came shortly after MISO filed a plan at FERC addressing long-term resource adequacy.[16] The result was a wholesale rewrite of Senate Bill 437 that largely deferred to MISO's plan, if it was ultimately approved, but also included a fallback mechanism should FERC reject MISO's proposal, as it ultimately did. See MCL 460.6w(2).

ABATE and Energy Michigan argued below that when the Legislature adopted Substitute H-4 and eliminated the detailed method for calculating each provider's local clearing requirement, this meant that the Legislature did not intend anyone to individually meet the local clearing requirement. But there is no evidence in the legislative history to support this notion. Rather, it appears from the record—beginning with a partial simplification in Substitute S-7 and continued simplification in Substitute H-4—that once the Legislature had MISO's long-term resource adequacy plan to use as a guide, Legislators no longer felt the need to provide their own different plan for allocating the local clearing requirement. This is borne out not only by the elimination of detailed compliance requirements across

[16] MISO filed its plan on November 1, 2016, and on November 10, 2016, the Senate adopted Substitute S-7 to Senate Bill 437, which simplified the method for calculating the local clearing requirement. On December 15, 2016, the House of Representatives adopted Substitute H-4, which eliminated the method altogether while giving MISO and the Commission discretion to establish the local clearing requirement.

the board in favor of adopting MISO's long-term adequacy construct in Section 6w(1) but also by the addition of requirements that the Commission request MISO's assistance in setting capacity obligations and defer to MISO's determinations of the resources that qualify. MCL 460.6w(8)(a)–(d). There is not one method for setting and applying the local clearing requirement to individual electric providers. The Commission considered many options in the case below and later proceedings;[17] many of these options are considerably less onerous on alternative electric suppliers than the proportional share allocation method in earlier versions of the legislation.

The Court of Appeals said that Legislature explicitly rejected an approach that would have applied the local clearing requirement to alternative electric suppliers, *In re Reliability Plans of Electric Utilities*, ___Mich App at ___; slip op at 14, but this is not what happened. The Legislature simply substituted one approach for another. Instead of adopting a specific method for allocating the total zone's local clearing requirement to individual electric providers, it gave MISO and the Commission discretion to incorporate the local clearing requirement into providers' capacity obligations. The Commission's interpretation is consistent with this legislative intent.

[17] In the case below, for example, Staff outlined two possible approaches to allocating the local clearing requirement: a phased-in approach and an incremental capacity approach. (8/1/17 Staff Report, p 3, F# 100 at 12–19.)

2. The Court of Appeals overlooked relevant facts.

According to MISO, "The physical location of generation resources is an important consideration in MISO's resource adequacy processes." (MISO Comments, p 3, F# 109.) ABATE and Energy Michigan, however, fixated on one aspect of that process—that alternative electric suppliers are not required to meet a proportionate share of a zone's local clearing requirement. Under this reasoning, MISO did not apply its local clearing requirement to individual suppliers and the Commission should not either. The Court of Appeals then found that MISO's general practice is to "impos[e] local clearing requirements on a zonal, not individual, basis." *In re Reliability Plans of Electric Utilities*, ___Mich App at ___; slip op at 10. And since Act 341 directs the Commission to "impose a local clearing requirement upon alternative electric suppliers in a manner consistent with MISO," the Commission cannot impose a local clearing requirement on them individually either. *Id*. The court's reasoning oversimplifies Act 341's mandate and MISO's process.

Under Act 341, since MISO helped the Commission set the local clearing requirements, they are presumptively valid. The Act does not limit the Commission's ability to determine the local clearing requirement if it does so with MISO's technical assistance. MCL 460.6w(8)(c).[18] Only if MISO refuses or fails to

[18] The first sentence of Section 6w(8)(c) reads, "In order to determine the capacity obligations, request that the appropriate independent system operator provide technical assistance in determining the local clearing requirement and planning reserve margin requirement." MCL 460.6w(8)(c). It includes no limitation.

give technical assistance does the statute require the Commission to set the local clearing requirement "consistent with federal reliability requirements."[19] In this case, MISO helped the Commission set the local clearing requirements, (9/15/17 Order, pp 48–49), so they are presumptively valid.

Even if this were not the case, Act 341 is consistent with MISO's current resource adequacy construct, which is designed to ensure that each zone satisfies its local clearing requirement. To accomplish this, every provider in the zone must do its share, or if not, rely on another provider to do more than its share. Under MISO's capacity construct, there are three ways for electric providers to meet their capacity needs: the first is through the planning resource auction that providers use to purchase capacity, the second is through the fixed resource adequacy plan that allows providers to rely on their own resources, and the third is through a capacity deficiency charge paid to providers who meet their share of the local clearing requirement. (MISO Tariffs §§ 69A.7.1, 69A.9, and 69A.10.) The local clearing requirement is initially imposed on the zone as a whole, but as discussed below, location requirements are also incorporated into each option just described.[20]

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[19] The limitation appears in the second sentence of Section 6w(8)(c), which reads, "If the appropriate independent system operator declines, or has not made a determination by October 1 of that year, the commission shall set any required local clearing requirement and planning reserve margin requirement, *consistent with federal reliability requirements*." MCL 460.6w(8)(c) (emphasis added).

[20] There is a fourth option referred to as self-scheduling, but it is essentially a variation of the planning resource auction option. Self-scheduling allows a provider to sell their owned and contracted for generation into and buy it back from the auction at a zero bid. To self-schedule, the resources must come from within the zone where they are being bought and sold.

For the first option, although providers can purchase power from outside the zone to meet their capacity need, if enough providers in a MISO zone do this, the zone will not meet its local clearing requirement and each provider in the zone will be penalized in the form of vastly higher charges. (MISO Tariff § 69A.7.1.) So, if providers collectively fail to meet the zone's local clearing requirement, alternative electric suppliers and anyone else who bought credits in the auction will pay higher charges. These higher charges will be assessed based on each provider's pro rata share of capacity in the zone. For all practical purposes, therefore, this mechanism imposes the local clearing requirement on individual alternative electric suppliers and other providers by penalizing them for not meeting the requirement.

The second option allows electric providers to opt out of the auction and instead submit a fixed resource adequacy plan showing they can meet demand using company-owned resources or resources under contract. Providers choosing to rely on a fixed resource adequacy plan must, among other things, identify the resources they own or have under contract and will use to meet their share of the zone's local clearing requirement. (MISO Tariff § 69A.9.) Using this second option removes a provider from the planning resource auction and relieves it of the consequences of the zone's failure to meet the local clearing requirement. This makes sense because the provider must show that it has met its share of the local clearing requirement before it can opt out. The Act 341 provisions requiring electric providers to meet capacity obligations and prove that they have done so are akin to this fixed resource adequacy process.

The third option also incorporates the local clearing requirement. According to MISO, electric providers may avoid meeting their planning reserve margin requirements through the planning resource auction by paying a capacity deficiency charge. MISO Business Practice Manual Resource Adequacy, BPM-011-r17 § 5.7 (effective August 25, 2017), at https://www.misoenergy.org/legal/business-practice-manuals/. The charge is even higher than the charge providers would pay if they cannot collectively meet the zone's local clearing requirement. Revenues from the capacity deficiency charge are distributed on a pro rata basis to other providers within the same local resource zone who met their share of the local clearing requirement and did not pay the capacity deficiency charge.[21] In this way, a provider that pays a capacity deficiency charge essentially pays a penalty for not contributing to the zone's local clearing requirement.

Although MISO gives electric providers several options to meet their capacity obligations, each option incorporates a local clearing requirement in one way or another. The Court of Appeals' conclusion to the contrary was wrong and distorted its legal findings. Relying on Sections 6w(6) and 6w(8)(c), which require the Commission to act consistent with federal tariffs and reliability requirements,[22] the court said that these provisions "militate against the MPSC's imposition of any local clearing requirements beyond what MISO has established . . . ." See *In re*

[21] *Id.*

[22] Section 6w(6) prohibits the Commission from setting a capacity charge that conflicts with a federal resource adequacy tariff and Section 6w(8)(c) requires the Commission to set a local clearing requirement consistent with federal reliability requirements

Reliability Plans of Electric Utilities, ___Mich App at ___; slip op at 10. But as just described, MISO's process does impose the local clearing requirement on individual electric suppliers, even if it does so indirectly through wholesale market charges in some instances.

The court's error stands out when considering the federal reliability requirements at issue. What few reliability requirements FERC has are determined by each regional transmission operator. For most of Michigan, that is MISO. And MISO's planning resource auction and capacity construct primarily concern electric capacity in the next planning year. MISO leaves long-term planning reserve requirements to states,[23] so the MPSC's local clearing requirement that requires providers to secure capacity three and four years into the future does not conflict with federal reliability requirements.

By setting a local clearing requirement under Act 341 and applying it to all individual electric providers, the Commission not only avoids a conflict with the federal reliability requirements, it directly supports and complements them, as MISO has acknowledged.[24] This approach provides a path to ensure adequate supplies are secured over the long term to protect reliability.

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[23] When MISO proposed the capacity construct that FERC rejected, it said, "State and local regulatory authorities continue to be responsible for reviewing the prudence of resource decisions that are subject to their individual jurisdictions, *including investment in generation facilities to meet long-term planning reserve requirements*. *In re MISO*, FERC Docket No. ER17-298, 11/1/16 MISO Transmittal Letter, p 2 (emphasis added).

[24] In its comments to the Commission, MISO said, "Many of these [resource adequacy] requirements, including provisions requiring each electric utility or alternative electric supplier to demonstrate that is has sufficient capacity, are

In sum, the court made factual errors (that MISO does not impose a local clearing requirement on alternative electric suppliers and that doing so is inconsistent with federal reliability requirements) that tainted its legal holding. It should have found that the MPSC's local clearing requirement was consistent with MISO's processes and applied it to individual alternative electric suppliers.

3. The Court of Appeals' opinion will cause material injustice by treating electric providers differently.

It would not be fair to apply the local clearing requirement to municipal and cooperative electric utilities, but not to alternative electric suppliers. Below, ABATE pointed out that the language in Section 6w(8)(b) allows an alternative electric supplier to use any resource, while a cooperative or municipal utility can only use a local resource. This, ABATE said, implies that only cooperative and municipal utilities can be assigned an individual local clearing requirement. ABATE, however, did not express a rational basis for this disparate treatment. Moreover, as the Commission explained, the provision allowing cooperative and municipal utilities to aggregate their resources to meet a local clearing requirement actually means that they and other electric providers "would otherwise be required to meet the requirements on an individual basis." (9/15/17 Order, p 38.)

It would be unreasonable, and contrary to legislative intent, to interpret the statute to impose the local clearing requirement solely on cooperative and municipal

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similar to those contained in MISO's filing of its Competitive Retail Solution. *These provisions will help the State of Michigan ensure that resource adequacy needs are met across various time horizons*." (MISO Comments, pp 2–3, F# 109.)

utilities—not to mention the equal protection problem that would arise from treating only these nonprofit utilities in such a discriminatory fashion. The Court of Appeals articulated no rational basis for this discriminatory treatment. And the Commission scoured the law, but it also found no rational basis for treating these utilities differently. It instead concluded that "the law is more logically understood to require that all individual utilities be treated similarly in terms of requirements, and that the aggregation option was intended to assist nonprofit utilities (many of which are small) to comply more easily." (9/15/17 Order, p 38.)

Singling out certain electric providers for compliance with the local clearing requirement, when the Legislature expressed no intent to do so, is a material injustice to all cooperative and municipal electric utilities. This interpretation should be avoided here where it is inconsistent with the language of the statute.

B. The Court of Appeals' opinion redefines how courts understand an agency's clear and unmistakable authority and infringes on the Commission's ratemaking authority.

Under MCR 7.305(B)(3), an appellant has grounds to appeal a decision if it "involves a legal principle of major significance to the state's jurisprudence." Likewise, under MCR 7.305(B)(5)(b), grounds exist if a decision "conflicts with a Supreme Court decision or another decision of the Court of Appeals." The Court of Appeals opinion below does both. It would redefine how courts understand an agency's clear and unmistakable authority. Before this decision, the Legislature could delegate authority to administrative agencies along with discretion to carry out that authority as long as it was not unbridled discretion. If the Court of

Appeals decision stands, the Legislature would have to detail, in persnickety fashion, every action an administrative agency can or cannot take. This not only undermines the constitutional separation of powers, it conflicts with court decisions controlling legislatively delegated authority.

1. The Court of Appeals' opinion redefines how courts understand an agency's clear and unmistakable authority.

The Court of Appeals did not analyze whether the Legislature properly delegated authority to the Commission to impose a local clearing requirement—instead focusing on whether the Commission exceeded its statutory authority—but any debate surrounding the scope of the Commission's authority to set a local clearing requirement should begin with the legislative authority delegated. This is a good starting point because the language used to delegate authority controls the scope of the authority that was granted and includes standards that control how the authority is exercised. If the Legislature intended to delegate broad authority to the Commission with standards that allowed it to exercise broad discretion, this is important to know from the outset. The delegation doctrine precludes "Congress from delegating its legislative power to either the executive branch or the judicial branch." *Taylor v Smithkline Beecham Corp,* 468 Mich 1, 8 (2003). The doctrine has its roots in the separation of powers principle underlying our tripartite system of government. *Id*. at 8. This Court has rejected many improper delegation challenges, given that "the complexities of modern government necessitate that

today many facets of traditionally 'legislative' power be exercised by administrative agencies. *People v Turmon*, 417 Mich 638, 649–650 (1983) (citations omitted).

The Legislature properly delegated broad authority and discretion to the Commission in this case. When the Legislature delegates authority to an agency, it may do so in broad terms as long as it includes standards that "are as reasonably precise as the subject matter requires or permits." *Seamen*, 396 Mich at 309 (quotation marks and citation omitted). "The preciseness of the standard will vary with the complexity and/or the degree to which [the] subject regulated will require constantly changing regulation." *Id*. To say that the capacity demonstration process is complex is a patented understatement. Not only is the process complex, it is repeated every year, requiring utilities to annually show that they will be able to meet future capacity needs. Given the complexity and evolving nature of electric providers' capacity obligations, the Legislature was right to delegate broad authority and discretion to the Commission. This broad discretion allowed the Commission and MISO to set electric providers' capacity obligations, including a local clearing requirement and planning reserve margin requirement. MCL 460.6w(8)(a),(b),(c). As long as the Commission sets these requirements with MISO's help or, if not, as long as they do not conflict with federal reliability requirements, the Commission does not exceed its authority. MCL 460.6w(8)(c).

The Court of Appeals' opinion undermines the delegation doctrine by not allowing the Commission to exercise the "many facets" of the legislative power delegated to it. See *Turmon*, 417 Mich at 649–650 (describing how many facets of

legislative authority are exercised by administrative agencies). The Court of Appeals ruled that "no provision of MCL 460.6w clearly and unmistakably authorizes the MPSC to impose a local clearing requirement upon individual alternative electric providers." *In re Reliability Plans of Electric Utilities*, ___Mich App at ___; slip op at 10. It did not matter to the court that the Legislature delegated authority to the Commission to set a local clearing requirement. Because the Legislature did not explicitly tell the Commission that it could apply the requirement to alternative electric suppliers, the court concluded that it could not. The Court of Appeals' overly constrictive view of the authority granted to the Commission goes too far.

The Legislature has authority to delegate discretionary authority to an administrative agency, as long as it is not unbridled discretion, and when it does so, it does not need to tell the agency every factor it must consider in exercising its discretion. See *Ranke v Michigan Corp & Sec Comm*, 317 Mich 304, 309–10 (1947) ("It would be quite impossible for the legislature to enumerate all the specific acts which would constitute dishonest or unfair dealing upon the part of those engaged in the sale of real estate."); see also *In re Application of Michigan Elec Transmission Co*, 309 Mich App 1, 21 (2014) ("The Legislature could not have specified with any practicality or feasibility what routes or configurations the PSC would be required to consider in each case.").[25] Requiring the Legislature to tell the Commission every

[25] This decision was affirmed in *In re Michigan Elec Transmission Co for Transmission Line*, 500 Mich 988 (2017).

factor it must consider in exercising its discretion is a practical impossibility and infringes on executive and legislative authority.

It is counterintuitive to argue that the Legislature delegated broad authority to the Commission to set a local clearing requirement without also giving it discretion to apply the requirement. The Court of Appeals reached a similar conclusion in *In re Consumers Energy Co*, 279 Mich App 180 (2008) where it rejected arguments that the Commission could use only securitization savings to fund the Low Income Energy Efficiency Fund (LIEEF). The court disagreed: "we have found no construction of the 'clear and unmistakable' requirement that would necessitate a separate legislative endorsement for each action taken in the course of administering the fund." *Id*. at 190. Since there was no requirement like this in the statute, the court held that "[t]he LIEEF obviously could not be administered if there were no monies in it, and the PSC therefore had to take measures to secure funding in order to fulfill its statutorily imposed duty to administer the LIEEF." *Id*. at 191.

In the same way, the local clearing requirement would serve no purpose if it could not be imposed on electric providers, so the Commission had to take measures to apply it to electric providers. And the manner in which the Commission applied the requirement to providers is entirely consistent with MISO's federal reliability requirements, as it is modeled off of MISO's fixed resource adequacy plan process and ensures that the capacity resources MISO counts as local resources also qualify under the Commission's requirements.

Allowing the Court of Appeals' opinion to stand would undermine the Legislature's ability to delegate authority, with discretion to exercise that authority, to administrative agencies.

2. The Court of Appeals did not consider the authority inherent in Act 341 or the Commission's general ratemaking authority.

In evaluating the Commission's statutory authority to impose a local clearing requirement, the Court of Appeals rejected the idea that the Commission might have inferred authority necessary to fulfill powers expressly granted. The court held that "powers specifically conferred on an agency cannot be extended by inference." *In re Reliability Plans of Electric Utilities*, ___Mich App at ___; slip op at 8 (quotation marks and citation omitted). The court also overlooked the Commission's broad ratemaking authority to set rates without judicial interference, making no mention of the Commission's ratemaking authority. The court did not deny that the Legislature delegated authority to the Commission, with assistance from the regional transmission operator, to set a local clearing requirement. Rather, the court held that the Commission could not impose this requirement on certain electric providers.[26] By doing so, it erected an artificial barrier to the Commission's ability to fulfill its statutory duties and it overlooked the

[26] The court said, "[N]o provision of MCL 460.6w clearly and unmistakably authorizes the MPSC to impose a local clearing requirement upon individual alternative electric providers." *In re Reliability Plans of Electric Utilities*, ___Mich App at ___; slip op at 10.

Commission's inherent authority to carry out its statutory duties and its general ratemaking authority.

The ability to apply a local clearing requirement to electric providers is inherent in the ability to set one. In an opinion written by Justice Taylor and signed by Justice Markman, both sitting on the Court of Appeals at the time, the court held, "The PSC has the inherent power necessary to carry out its express duties." *In re Procedure & Format for Filing Tariffs Under Michigan Telecommunications Act*, 210 Mich App 533, 540 (1995) (*In re Tariffs*). While the court reversed several aspects of the Commission's order in that case, the court rejected arguments that the Commission lacked authority to determine "what telecommunications services are and are not regulated." *Id*. at 539. It held, "We conclude that the Legislature clearly authorized the PSC to require providers of regulated services to file tariffs, § 202(c), and that, in order to do so, it was necessary for the PSC to identify which services are regulated." *Id*.

If the court in *In re Tariffs* had used the court's reasoning below, it would have found that because the Commission did not have specific authority to determine which services are or are not regulated, it lacked authority to apply the tariffs to any service. The court properly rejected that argument then and should have rejected the same argument in this case, upholding the Commission's ability to apply the local clearing requirement to individual electric providers. The Legislature required both electric utilities and alternative electric suppliers to show that they could meet future capacity obligations, MCL 460.6w(8)(a),(b), and it

authorized the Commission to set a local clearing requirement as part of the capacity obligations. MCL 460.6w(8)(c). It does not make sense to hold that the Commission had authority to set these local clearing requirements, but that it could not require alternative electric suppliers or electric utilities to meet the requirement.[27] If it does not have inherent authority to apply the local clearing requirement, the requirement is meaningless. (See Part I.A.1.a.)

Holding that the Commission has inherent authority to apply the local clearing requirement is different than extending the Commission's power by inference, which courts cannot ordinarily do. The Court of Appeals drew this distinction in *Herrick Dist Library v Library of Mich*, 293 Mich App 571 (2011)—an opinion the Court of Appeals cited extensively below. In that case, the court held that while an administrative agency may not normally infer rulemaking authority from an enabling statute, an agency may infer authority if " 'necessary to the due and efficient exercise of the power expressly granted' by the enabling statute." *Id.* at 586 (quoting *Ranke*, 317 Mich at 309). The court explained that "[t]his standard is a carefully crafted compromise that allows the Legislature to delegate some degree of authority to administrative agencies, but ensures that the administrative agency does not expand its powers beyond those which the Legislature intended to give it." *Id.*

[27] Although the court did not extend its reasoning to electric utilities, as discussed above, the same reasoning that the court applied to alternative electric providers could apply to electric utilities to free them of their obligation to meet the local clearing requirement.

Even under *Herrick Dist Library*, therefore, the court could and should have found that the Commission had inherent authority to apply the local clearing requirement that it had express authority to create. And the court certainly should have found that the Commission had this authority if it had considered the Commission's broad ratemaking authority. "Ratemaking by the PSC is a legislative function." *Ford Motor Co v Pub Serv Comm*, 221 Mich App 370, 373 (1997). And when the Commission exercises this legislative authority and sets rates, it "is not bound to follow any particular method or formula." *Id.*, quoting *Mich Bell Telephone Co v Pub Serv Comm,* 332 Mich 7, 36 (1952). Indeed, courts defer to the Commission's expertise when it exercises its legislative, ratemaking authority. *Consumers Power Co v Pub Serv Comm*, 226 Mich App 12, 21 (1997) ("[W]hen the PSC exercises its 'legislative' ratemaking authority . . . this Court . . . accords deference to the administrative expertise and judgment of the PSC absent some breach of a constitutional standard or statutory mandate or limitation . . . .").

The proceeding below was a ratemaking proceeding, which is another reason why the court should have deferred to the Commission's judgment. The state reliability mechanism and capacity demonstration process at issue are multifaceted regulatory structures that allow electric providers to build generation, purchase power, or have their customers pay a capacity charge to meet their capacity obligations. Each of these methods account for the location of the generation asset in one way or another that flows through to rates. But it is the last way—the capacity charge—that throws the Commission's ratemaking authority into the

sharpest relief. By imposing a capacity charge on customers of electric providers who do not demonstrate that they can meet their capacity obligations, the Commission can enforce the local clearing requirement by setting a capacity charge that accounts for it. Without question, this is ratemaking authority. And it is just one facet of the regulatory structure that is inseparable from the rates electric providers charge. Because the Commission was exercising its legislative, ratemaking authority when it established this regulatory structure, the court should have deferred to the Commission's judgment absent some breach of a constitutional standard or statutory limitation. *Consumers Power Co*, 226 Mich App at 21.

In this ratemaking context, courts have even held that when the statute is silent about the scope of the Commission's authority, the Commission retains discretion to act. For example, when evaluating the Commission's decision to allocate costs in a certain way, the Court of Appeals held that "the Legislature intended the specificity where it was specific and the silence where it was silent." *In re Detroit Edison Co Application*, 296 Mich App 101, 118 (2012). And where the Legislature was silent about how certain allocation "components would be determined," it let the Commission and the utilities it regulates "determine such components . . . in the normal course of business." *Id*.

Likewise, when addressing the Commission authority to set the initial contract price for gas purchases, the court held that the "statute is simply silent" on this subject but that "this silence should not be interpreted as granting utilities

unfettered discretion in setting initial prices and conditions of service without any regulatory oversight . . . ." *Midland Cogeneration Venture Ltd P'ship v Pub Serv Comm*, 199 Mich App 286, 309 (1993). The Consumers Energy Company had argued that the statute at issue in that case limited "the Commission's exercise of its rate-making authority to an individual contract-by-contract approach." *Id.* at 310. But the court held that Consumers' interpretation "frustrate[ed] the PSC's ability to establish and maintain uniform and nondiscriminatory rates throughout the gas-transportation industry." *Id.*

Like the laws at issue in these Court of Appeals cases, Act 341 is silent about the Commission's authority to impose the local clearing requirement on alternative electric suppliers. Given that this is a ratemaking question, the Commission retained discretion to impose the local clearing requirement. The Court of Appeals' opinion holding that the Commission lacked this discretion "frustrat[ed] the PSC's ability to establish and maintain uniform and nondiscriminatory rates." *Midland Cogeneration Venture Ltd P'ship*, 199 Mich App at 309.

C. The public has an interest in accessible and reliable power sources that the Court of Appeals' opinion jeopardizes.

Under MCR 7.305(B)(2), an appellant has grounds to appeal an issue if it "has significant public interest and the case is one by or against the state or one of its agencies." The public's interest in accessible and reliable power cannot seriously be questioned. Physical constraints on the transmission system mean that the State must rely on local generation to meet much of its demand. Recognizing this,

the Legislature passed Act 341 requiring the Commission to set, with MISO's assistance, a local clearing requirement that encourages electric providers to use local resources to meet some portion of their customers' capacity needs. The public has a compelling interest in applying this local clearing requirement equitably to all electric providers in order to safeguard the State's electric grid. As explained above, if it is not applied to all electric providers, the entire zone could fall short of the requirement, which would increase prices for all providers, even those who met their share of the requirement.

Statements made by elected officials confirm that the local clearing requirement is an issue of public interest. Although some of these officials take the opposite view of the statute, their statements are evidence that this issue is in the public's interest. One State Representative, for instance, said, "Our objective should be . . . [to provide] customers the cheapest electricity possible, regardless of whether it comes from a wind farm in North Dakota or an oil well in Texas."[28] By contrast, what concerned some State Senators were "projections that Zone 7, or Lower Michigan, could have a significant shortfall in reserve electricity capacity in 2017 and possibly beyond."[29] The lively debate surrounding the local clearing requirement in the statute is evidence that it is in the public's interest.

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[28]Press Release, Representative Gary Glenn, House Energy chair: Utility regulators may violate new state energy law (August 5, 2017), at http://gophouse.org/house-energy-chair-utility-regulators-may-violate-new-state-energy-law/.

[29] Greene, Jay, *House Energy Chairman: PSC headed in direction to violate state energy law*, CRAIN'S DETROIT BUSINESS, August 10, 2017, available at http://www.crainsdetroit.com/article/20170810/news/636021/house-energy-chairman-psc-headed-in-direction-to-violate-state-energy.

If the Court of Appeals' rationale for excluding alternative electric suppliers from the local clearing requirement is extended to regulated utilities, it would jeopardize the whole purpose of Act 341 and subvert the public's interest in reliable energy. The court's reasoning might also be extended to the planning reserve margin requirements, which would further undermine the law's purpose. (See Part I.A.1.a.) Without an applicable local clearing requirement or planning reserve margin requirement for most utilities, there would be no requirements for them to meet in their capacity demonstrations. The regulatory construct created by Act 341 would become, contrary to the rules of statutory construction, nugatory.

CONCLUSION AND RELIEF REQUESTED

The Michigan Public Service Commission respectfully asks this Court to grant leave to appeal and reverse the Court of Appeals' July 12, 2018 opinion and instead affirm the Commission's September 15, 2017 order. Allowing the Commission to set and apply a local clearing requirement will promote the public's interest in reliable energy consistent with the Legislature's intent.

Respectfully submitted,

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Dated: August 23, 2018

Attachment 1

STATE OF MICHIGAN

COURT OF APPEALS

In re RELIABILITY PLANS OF ELECTRIC UTILITIES FOR 2017-2021.

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION, CONSUMERS ENERGY COMPANY, ENERGY MICHIGAN, INC., and MICHIGAN ELECTRIC AND GAS ASSOCIATION,

Appellees.

FOR PUBLICATION
July 12, 2018
9:00 a.m.

No. 340600
Public Service Commission
LC No. 00-018197

In re RELIABILITY PLANS OF ELECTRIC UTILITIES FOR 2017-2021.

ENERGY MICHIGAN, INC.,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION, CONSUMERS ENERGY COMPANY, and MICHIGAN ELECTRIC AND GAS ASSOCIATION,

Appellees.

No. 340607
Public Service Commission
LC No. 00-018197

Before: METER, P.J., and GADOLA and TUKEL, JJ.

GADOLA, J.

In Docket No. 340600, appellant Association of Businesses Advocating Tariff Equity (ABATE)[1] appeals as of right the final order of appellee Michigan Public Service Commission (MPSC) in its case no. U-18197. In Docket No. 340607, appellant Energy Michigan, Inc. (Energy Michigan)[2] appeals as of right the same order of the MPSC. In each of these consolidated cases,[3] appellants contend that the MPSC erred by determining that it is empowered by the Legislature under 2016 PA 341 (Act 341) to impose a local clearing requirement upon individual alternative electric suppliers. In Docket No. 340607, Energy Michigan additionally contends that the order of the MPSC purports to impose new rules upon electric providers in this state without the required compliance with Michigan's Administrative Procedures Act (APA), MCL 24.201, *et seq*. We reverse and remand.

I. BACKGROUND AND FACTS

At the end of 2016, our Legislature enacted new electric utility legislation that included 2016 PA 341 (Act 341). That act added, among other statutory sections, MCL 460.6w. These appeals arise from an order issued by the MPSC as part of its implementation of MCL 460.6w.

By way of background, Michigan's Legislature previously enacted what was known as the Customer Choice and Electricity Reliability Act, 2000 PA 141 and 2000 PA 142, MCL 460.10 *et seq*., to "further the deregulation of the electric utility industry." *In re Application of Detroit Edison Co for 2012 Cost Recovery Plan*, 311 Mich App 204, 207 n 2; 874 NW2d 398 (2015). That act permitted customers to buy electricity from alternative electric suppliers instead of being limited to purchasing electricity from incumbent utilities, such as appellee Consumers Energy Company (Consumers). *Consumers Energy Co v Michigan Pub Serv Comm*, 268 Mich App 171, 173; 707 NW2d 633 (2005). Among the purposes of the act, as amended, is to "promote financially healthy and competitive utilities in this state." MCL 460.10(b).

Also by way of background, the Midcontinent Independent System Operator (MISO) is the regional transmission organization responsible for managing the transmission of electric power in a large geographic area that spans portions of Michigan and 14 other states. To accomplish this, MISO combines the transmission facilities of several transmission owners into a single transmission system. In addition to the transmission of electricity, MISO's functions include capacity resource planning. MISO has established ten local resource zones; most of

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[1] ABATE describes itself as "an interest group of large energy users representing its members before regulatory and governmental bodies and other organizations that affect Michigan's energy pricing, reliability, and terms and conditions of service." https://abate-energy.org.

[2] Energy Michigan describes itself as a group devoted to the protection and promotion of "alternative and independent power supply, cogeneration, advanced energy industries and their customers." Energy Michigan intervenes in Michigan Public Service Commission cases affecting those industries. https://energymichigan.org.

[3] These appeals were consolidated on this Court's own motion. *In re Reliability Plans of Electric Utilities for 2017-2021*, unpublished order of the Court of Appeals, entered November 15, 2017 (Docket Nos. 340600; 340607).

Michigan's lower peninsula is located in MISO's local resource zone 7, while the upper peninsula is located in MISO's local resource zone 2.

Each year, MISO establishes for each alternative electric supplier in Michigan the "planning reserve margin requirement."[4] MISO also establishes the "local clearing requirement."[5] Under MISO's system, there generally are no geographic limitations on the capacity resources that may be used by a particular supplier to meet its planning reserve margin requirement. That is, MISO does not impose the local clearing requirement upon alternative electric suppliers individually, but instead applies the local clearing requirement to the zone as a whole. Each individual electricity supplier is not required by MISO to demonstrate that its energy capacity is located within Michigan, as long as the zone as a whole demonstrates that it has sufficient energy generation located within Michigan to meet federal requirements.

MISO also serves as a mechanism for suppliers to buy and sell electricity capacity through an "auction." This allows for the exchange of capacity resources across energy providers and resource zones. The MISO auction is conducted each year for the purchase and sale of capacity for the upcoming year, which allows suppliers to buy and sell enough capacity to meet their planning reserve margin requirement and allows each zone as a whole to meet the zone's local clearing requirement.

At the end of 2016, our Legislature enacted Act 341, in part adding MCL 460.6w, which imposes resource adequacy requirements upon electric service providers in Michigan and imposes certain responsibilities upon the MPSC. Under MCL 460.6w(2), the MPSC is required under certain circumstances to establish a state reliability mechanism. That section provides, in relevant part:

> If, by September 30, 2017, the Federal Energy Regulatory Commission does not put into effect a resource adequacy tariff that includes a capacity forward auction or a prevailing state compensation mechanism, then the commission shall establish a state reliability mechanism under subsection (8). MCL 460.6w(2).

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[4] Act 341 defines "planning reserve margin requirement" as "the amount of capacity equal to the forecasted coincident peak demand that occurs when the appropriate independent system operator footprint peak demand occurs plus a reserve margin that meets an acceptable loss of load expectation as set by the commission or the appropriate independent system operator under subsection (8)." MCL 460.6w(12)(e).

[5] Act 341 defines "local clearing requirement" to mean "the amount of capacity resources required to be in the local resource zone in which the electric provider's demand is served to ensure reliability in that zone as determined by the appropriate independent system operator for the local resource zone in which the electric provider's demand is served and by the commission under subsection (8)." MCL 460.6w(12)(d).

The parties agree that because the Federal Energy Regulatory Commission did not put into effect the MISO-proposed tariff, the MPSC is required by section 6w(2) to establish a state reliability mechanism. A "state reliability mechanism" is defined by the statute as "a plan adopted by the commission in the absence of a prevailing state compensation mechanism to ensure reliability of the electric grid in this state consistent with subsection (8)." MCL 460.6w(12)(h). The state reliability mechanism is to be established consistent with section 6w(8), which provides, in relevant part, that the MPSC shall:

> (b) Require . . . that each alternative electric supplier, cooperative electric utility, or municipally owned electric utility demonstrate to the commission, in a format determined by the commission, that for the planning year beginning 4 years after the beginning of the current planning year, the alternative electric supplier, cooperative electric utility, or municipally owned electric utility owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the appropriate independent system operator, or commission, as applicable. One or more municipally owned electric utilities may aggregate their capacity resources that are located in the same local resource zone to meet the requirements of this subdivision. One or more cooperative electric utilities may aggregate their capacity resources that are located in the same local resource zone to meet the requirements of this subdivision. A cooperative or municipally owned electric utility may meet the requirements of this subdivision through any resource, including a resource acquired through a capacity forward auction, that the appropriate independent system operator allows to qualify for meeting the local clearing requirement. A cooperative or municipally owned electric utility's payment of an auction price related to a capacity deficiency as part of a capacity forward auction conducted by the appropriate independent system operator does not by itself satisfy the resource adequacy requirements of this section unless the appropriate independent system operator can directly tie that provider's payment to a capacity resource that meets the requirements of this subsection. By the seventh business day of February in 2018, an alternative electric supplier shall demonstrate to the commission, in a format determined by the commission, that for the planning year beginning June 1, 2018, and the subsequent 3 planning years, the alternative electric supplier owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the appropriate independent system operator, or commission, as applicable. If the commission finds an electric provider has failed to demonstrate it can meet a portion or all of its capacity obligation, the commission shall do all of the following:
>
> (i) For alternative electric load, require the payment of a capacity charge that is determined, assessed, and applied in the same manner as under subsection (3) for that portion of the load not covered as set forth in subsections (6) and (7). . . . [MCL 460.6w(8)(b) (emphasis added).]

Thus, section 6w(8)(b) requires each alternative electric supplier, cooperative electric utility, and municipally owned electric utility to demonstrate to the MPSC that it has sufficient capacity to meet its "capacity obligations." The statute does not define "capacity obligations," but in section 6w(8)(c), the statute provides that:

> (c) In order to determine the capacity obligations, [the MPSC shall] request that the appropriate independent system operator provide technical assistance in determining the local clearing requirement and planning reserve margin requirement. If the appropriate independent system operator declines, or has not made a determination by October 1 of that year, the commission shall set any required local clearing requirement and planning reserve margin requirement consistent with federal reliability requirements. [MCL 460.6w(8)(c).]

Section 6w(8)(b) also provides that municipally owned electric utilities are permitted to "aggregate their capacity resources that are located in the same local resource zone to meet the requirements of this subdivision" and that cooperative electric utilities are permitted to "aggregate their capacity resources that are located in the same local resource zone to meet the requirements of this subdivision." Section 6w(8)(b) also permits a cooperative or municipally owned electric utility to "meet the requirements of this subdivision through any resource, including a resource acquired through a capacity forward auction, that [MISO] allows to qualify for meeting the local clearing requirement." Section 6w(8)(b), however, does not include a similar provision for alternative electric suppliers and is, in fact, silent as to whether alternative electric suppliers may aggregate their capacity resources that are located in the same local resource zone to meet the requirements of the subdivision.

MCL 460.6w(3) directs the MPSC to establish a capacity charge that a provider must pay if it fails to satisfy the capacity obligations established under section 6w(8). Section 6w(6), however, directs that no capacity charge be assessed against an alternative electric supplier who demonstrates that "it can meet its capacity obligations through owned or contractual rights to any resource that the appropriate independent system operator[6] allows to meet the capacity obligation of the electric provider. The preceding sentence shall not be applied in any way that conflicts with a federal resource adequacy tariff, when applicable." MCL 460.6w(6).

After the enactment of Act 341, the MPSC worked collaboratively in a workgroup process to implement MCL 460.6w. On September 15, 2017, the MPSC issued an order in its case number U-18197, imposing new requirements on alternative electric suppliers as part of its implementation of MCL 460.6w. Among the holdings of the MPSC in that order, the MPSC determined that MCL 460.6w authorizes it to impose a local clearing requirement upon individual alternative electric suppliers.[7] ABATE and Energy Michigan challenge this

[6] MCL 460.6w(12)(a) defines the "appropriate independent system operator" as MISO.

[7] This decision was made in the context of competing interests between large public utilities, which contend that alternative electric suppliers are not investing in the energy infrastructure of Michigan, and therefore are not contributing to long-term energy reliability in the state, and smaller alternative electric suppliers, who provide lower cost electricity to customers by relying in part on capacity generated outside of Michigan. Large public utilities contend that their costs are higher because of the investment they make in long-term energy production in Michigan, while alternative electric suppliers contend that if they are required to rely almost exclusively on

interpretation of MCL 460.6w as erroneous, while Consumers supports the decision of the MPSC. Energy Michigan further challenges the new requirements imposed by the MPSC as improperly implemented without compliance with the APA.

II. ANALYSIS

A. RIPENESS

As an initial consideration, we address the assertion by the MPSC and Consumers that the issue in this appeal related to the imposition of a local clearing requirement is not yet ripe for resolution by this Court. They contend that the September 15, 2017 order of the MPSC in U-18197 did not impose a local clearing requirement on individual alternative electric suppliers, but instead merely announced that the MPSC has the authority to do so. The MPSC and Consumers assert that until the MPSC takes the final step of imposing a specific local clearing requirement upon an individual alternative electric supplier, the question whether the MPSC has the authority to do so is not ripe for review. We disagree.

The ripeness doctrine requires that an actual injury be sustained by the plaintiff. *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 554; 904 NW2d 192 (2017). "The doctrine of ripeness is designed to prevent 'the adjudication of hypothetical or contingent claims before an actual injury has been sustained.' " *Huntington Woods v Detroit*, 279 Mich App 603, 615; 761 NW2d 127 (2008), quoting *Mich Chiropractic Council v Comm'r of the Office of Fin and Ins Servs*, 475 Mich 363, 371 n 14; 716 NW2d 561 (2006), overruled on other grounds *Lansing Sch Ed Ass'n*, 487 Mich 319. "A claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 282; 761 NW2d 210 (2008).

To determine whether an issue is ripe for review, we assess "whether the harm asserted has matured sufficiently to warrant judicial intervention." *People v Bosca*, 310 Mich App 1, 56; 871 NW2d 307 (2015) (citation omitted); see also *Dep't of Social Services v Emmanuel Baptist Preschool*, 434 Mich 380, 412 n 48; 455 NW2d 1 (1990) (CAVANAGH J., concurring). In making this assessment, this Court must balance any uncertainty of whether a party will actually suffer future injury against the potential hardship of denying anticipatory relief. *People v Robar*, 321 Mich App 106, 128; 910 NW2d 328 (2017). This Court will find an issue ripe for review when it is a "threshold determination," the resolution of which is not dependent upon any further decision by the MPSC. *Citizens*, 280 Mich App 282-283; see also *Mich United Conservation Clubs v Secretary of State*, 463 Mich 1009; 625 NW2d 377 (2001) (controversy was ripe for review when it involved a "threshold determination" whether petitions met constitutional prerequisites and was not dependent upon the Board of Canvassers' counting or consideration of petitions).

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capacity produced within the state, they will be forced to leave the market in Michigan and consumer choice for electricity will effectively be at an end.

A review of the MPSC's September 15, 2017 order in this case demonstrates that the MPSC has not merely announced that it has the authority to impose a local clearing requirement on individual alternative electric suppliers; it has announced its decision to assert that authority, leaving only the methodology of the exercise of that authority to chance. In its earlier June 15, 2017 order in its case U-18197, and reiterated in its September 15, 2017 order, the MPSC stated that "the Commission finds that a locational requirement is required under Section 6w and that a locational requirement applicable to individual LSEs is allowed as part of the capacity obligations set forth by the Commission pursuant to Section 6w in order to ensure all providers contribute to long-term resource adequacy in the state." The MPSC's September 15, 2017 order further states that "a properly designed locational requirement applied to individual load serving entities as part of a demonstration that capacity obligations have been met is consistent with [the statute's] requirements." In light of these determinations by the MPSC, the alleged harm in this case does not rest upon contingent future events that may not occur as anticipated or at all; the decision to apply a locational requirement to individual alternative electric suppliers has already been made, with the only remaining variable being the methodology the MPSC will employ. There is thus little uncertainty about whether the asserted harm will occur, and we weigh that factor against the potential hardship of denying anticipatory relief. *Robar*, 321 Mich App at 128.

We conclude that the harm asserted in this case warrants judicial intervention. As in *Citizens*, the decision of the MPSC in its September 15, 2017 order that it has the authority to impose a local clearing requirement on individual alternative electric suppliers is a "threshold determination" ripe for our consideration given that the resolution of the issue is not dependent upon any further decision by the MPSC. *Citizens*, 280 Mich App 282-283; see also *Mich United Conservation Clubs*, 463 Mich 1009. We therefore hold that the question whether the MPSC erred in determining that it has statutory authority to impose a local clearing requirement upon individual alternative electric suppliers is ripe for our review.

B. STANDARD OF REVIEW

When reviewing an order of the MPSC, this Court generally references MCL 462.25, which states:

> All rates, fares, charges, classification and joint rates fixed by the commission and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie, lawful and reasonable until finally found otherwise in an action brought for the purpose pursuant to the provisions of section 26 of this act, or until changed or modified by the commission as provided for in section 24 of this act.

See, e.g., *Attorney General v Pub Serv Comm*, 269 Mich App 474, 479; 713 NW2d 290 (2006). In addition, this Court generally notes that as a reviewing court, we give due deference to the administrative expertise of the MPSC. See, e.g., *Attorney General v Pub Serv Comm No. 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999). In this case, however, appellants challenge whether a specific holding of the MPSC in its final order in its case no. U-18197 exceeds the authority of the MPSC granted by law.

To be valid, a final order of the MPSC must be authorized by law, and also must be supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *Attorney General v Pub Serv Comm*, 165 Mich App 230, 235; 418 NW2d 260 (1988). Agencies have authority to interpret the statutes that they administer and enforce, *Clonlara, Inc v State Board of Ed*, 442 Mich 230, 240; 501 NW2d 88 (1993), and we respectfully consider an agency's interpretation of a statute that it is empowered to execute, and will not overrule that construction absent cogent reasons. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008). But the construction the MPSC gives to a statute is not binding on the courts. *Id*. Ultimately, the statutory language itself is controlling, *id*. at 108, and this Court will neither abandon nor delegate its responsibility to determine legislative intent. *Consumers Energy Co,* 268 Mich App at 174-175. Moreover, we review de novo issues of statutory interpretation, *Uniloy Milacron USA Inc v Dep't of Treasury*, 296 Mich App 93, 96; 815 NW2d 811 (2012), including the MPSC's determinations regarding the scope of its own authority. *Consumers Power Co v Pub Serv Commission*, 460 Mich 148, 157; 596 NW2d 126 (1999); *In re Application of Consumers Energy Co to Increase Rates*, 316 Mich App 231, 237; 891 NW2d 871 (2016). In sum, when considering the construction given to a statute by an agency, our ultimate concern is the proper construction of the plain language of the statute regardless of the agency's interpretation, *Rovas*, 482 Mich at 108, and our primary obligation is to discern and give effect to the Legislature's intent. *City of Coldwater v Consumers Energy Co*, 500 Mich 158, 167; 895 NW2d 154 (2017).

C. MCL 460.6w

The MPSC, in its September 15, 2017 order, held that MCL 460.6w authorizes it to impose a local clearing requirement on individual alternative electric suppliers. ABATE and Energy Michigan challenge this interpretation of MCL 460.6w as erroneous. We agree with ABATE and Energy Michigan.

The MPSC has no common law powers and possesses only the authority granted to it by the Legislature. *Consumers Power Co*, 460 Mich at 155. In addition, we strictly construe the statutes that confer power upon the MPSC, and that power must be conferred by "clear and unmistakable language." *Id*., quoting *Union Carbide Corp v Public Service Comm*, 431 Mich 135, 151; 428 NW2d 322 (1988). Accordingly, "powers specifically conferred on an agency cannot be extended by inference; . . . no other or greater power was given than that specified." *Herrick Dist Library v Library of Mich*, 293 Mich App 571, 582-583; 810 NW2d 110 (2011) (quotation marks and citations omitted). In addition, when construing the statutes empowering the MPSC, this Court does not weigh the economic or public policy factors underlying the decisions of the MPSC; those concerns are the province of the Legislature. *Consumers Power Co*, 460 Mich at 156. Instead, our concern is the question of law presented to us, the "statutory authority of the [MPSC] in the light of the facts before us . . . ." *Huron Portland Cement Co v Pub Serv Comm*, 351 Mich 255, 262; 88 NW2d 492 (1958).

The MPSC's September 15, 2017 order provides that the order "establishes the format and requirements for electric providers in the state to make demonstrations to the Commission that they have sufficient electric capacity arrangements pursuant to Section 6w" of Act 341. In that order, the MPSC asserts that it is implementing a law administered by the agency, that it has the authority to impose a methodology on all electric load serving entities active in the state, and

specifically, that "the Commission finds that a locational requirement is required under Section 6w and that a locational requirement applicable to individual [load serving entities] is allowed as part of the capacity obligations set forth by the commission pursuant to Section 6w in order to ensure all providers contribute to long-term resource adequacy in the state."

In the order, the MPSC reasons that because the statute refers to capacity obligations only in the context of the obligations of individual providers, the statute's local clearing requirement should likewise be understood to apply to individual providers. Quoting its earlier order, the MPSC order provides, in relevant part:

> As defined in Section 6w(12)(d), "local clearing requirement" means "the amount of capacity resources required to be in the local resource zone in which the electric provider's demand is served to ensure reliability in that zone as determined by the appropriate independent system operator for the local resource zone in which the electric provider's demand is served and by the commission under subsection (8)." As noted above, in requesting assistance from MISO in determining capacity obligations, the Commission is tasked with requesting technical assistance in determining this local clearing requirement.
>
> Section 6w(8) also requires individual electric providers to demonstrate to the Commission that they can meet capacity obligations. The Commission is directed to require each electric provider to demonstrate that it "owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the appropriate independent system operator, or commission, as applicable" four years into the future. These capacity obligations necessarily include a local clearing requirement.
>
> It is clear that the statute requires the Commission to create capacity obligations, that these capacity obligations include a locational requirement, and that the Commission, in setting locational capacity obligations, is allowed to require a demonstration by individual electric providers that the resources that they use to meet their capacity obligations meet a local clearing requirement. The Commission acknowledges the inter-relatedness of the MISO and Section 6w capacity demonstration processes, but also points out that these are distinct activities. These activities should be harmonized to the extent practicable, but the fundamental responsibility of the Commission is to meet Michigan's statutory obligations.
>
> Thus, the Commission finds that a locational requirement is required under Section 6w and that a locational requirement applicable to individual LSEs is allowed as part of the capacity obligations set forth by the Commission pursuant to Section 6w in order to ensure all providers contribute to long-term resource adequacy in the state.

The MPSC and Consumers urge us to read the provisions of MCL 460.6w as bestowing upon the MPSC authority to impose a local clearing requirement upon individual alternative electric suppliers. They reason that section 6w(8)(c) suggests that the "capacity obligations" of

alternative electric suppliers are required to be based in part upon the local clearing requirement. The MPSC and Consumers further reason that because section 6w(8)(b) refers to the capacity obligations with respect to each individual electric provider, it must be inferred that the local clearing requirement was meant to be applied to each alternative electric supplier individually.

We cannot follow the urging of the MPSC and Consumers, however, because a review of the statute reveals that no provision of MCL 460.6w clearly and unmistakably authorizes the MPSC to impose a local clearing requirement upon individual alternative electric providers. We acknowledge that section 6w(8)(b) provides that each electric provider must demonstrate that it owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the appropriate independent system operator, or the MPSC, as applicable. Section 6w(8)(c) directs that "[i]n order to determine the capacity obligations," the MPSC must "set any required local clearing requirement and planning reserve margin requirement, consistent with federal reliability requirements," and seek technical assistance from MISO in doing so. But although section 6w(8)(c) thus requires the MPSC to determine the local clearing requirement in order to determine capacity obligations, it does not specifically authorize the MPSC to impose the local clearing requirement upon alternative electric suppliers individually. Because the MPSC has only the authority granted to it by the Legislature by "clear and unmistakable language," *Consumers Power Co*, 460 Mich at 155-156, and because authority cannot be extended by inference, *Herrick Dist Library*, 293 Mich App at 582-583, we must decline the invitation to infer such additional authority upon the MPSC in this case.

Moreover, a review of the entire statute suggests that the MPSC is obligated to apply the local clearing requirement in a manner consistent with MISO. A general principle of statutory construction is that a statute must be read as a whole, and that a seemingly ambiguous provision may thereby be clarified in the context of the whole statute. *Id*. Here, a review of the statute as a whole reveals that MCL 460.6w(3) directs the MPSC to establish a capacity charge that a provider must pay if it fails to satisfy the capacity obligations as required under section 6w(8). Section 6w(6), however, directs that no capacity charge be assessed against an alternative electric supplier who demonstrates that "it can meet its capacity obligations through owned or contractual rights to any resource that the appropriate independent system operator (MISO) allows to meet the capacity obligation of the electric provider." MCL 460.6w(6). The parties acknowledge that MISO permits an alternative electric supplier to meet its capacity obligations, including the local clearing requirement, by owning or contracting for capacity resources located outside the applicable local resource zone, and does not require each alternative electric supplier to demonstrate a proportionate share of the local clearing requirement.

Similarly, section 6w(6) constrains the MPSC from assessing any capacity charge in a manner that "conflicts with a federal resource adequacy tariff, when applicable," and section 6w(8)(c) requires that the MPSC set any planning reserve margin or local clearing requirements "consistent with federal reliability requirements." These provisions militate against the MPSC's imposition of any local clearing requirements beyond what MISO has established, and instead impose upon the MPSC a continuing obligation to observe MISO's general practice of imposing local clearing requirements on a zonal, not individual, basis. Thus, reading MCL 460.6w as a whole indicates that the MPSC is directed to impose a local clearing requirement upon alternative electric suppliers in a manner consistent with MISO, and not individually upon alternative electric suppliers.

The MPSC notes that section 6w(8)(b) allows cooperative or municipally owned electric utilities to "aggregate their capacity resources that are located in the same local resource zone" for purposes of satisfying their capacity obligations, and further allows those entities to resort to "any resource, including a resource acquired through a capacity forward auction, that [MISO] allows to qualify for meeting the local clearing requirement." The MPSC interprets section 6w(8) as follows:

> This provision allowing municipally-owned and cooperative electric utilities to aggregate their resources in order the meet the requirements of Section 6w(8) clearly implies that these utilities would otherwise be required to meet the requirements on an individual basis. The Commission finds that it would be unreasonable to interpret the statute such that this obligation for individual compliance "for meeting the local clearing requirement" is placed solely on municipally-owned and cooperative utilities under Section 6w. The Commission can find nothing in the law, and no rational basis, to indicate an intent to place a local clearing requirement only on non-profit utilities. Instead, the law is more logically understood to require that all individual utilities be treated similarly in terms of requirements, and that the aggregation option was intended to assist nonprofit utilities (many of which are small) to comply more easily. Thus, this language further supports the Commission's interpretation that a locational requirement is authorized and may be applied to individual electric providers.

The MPSC argues that because section 6w(8)(b) is silent[8] as to whether an alternative electric supplier may similarly aggregate its resources, the intent of the statute must be to permit the imposition of a local clearing requirement upon individual alternative electric suppliers. Again, however, reaching this conclusion requires the inference that section 6w permits the MPSC to establish a capacity obligation that includes an individual local clearing requirement contrary to that imposed by MISO. Because we must strictly construe the statutes that confer power upon the MPSC, and that power may not be inferred but instead must be conferred by "clear and unmistakable language," we conclude that MCL 460.6w does not authorize the MPSC

[8] Actually, the law "is more logically understood" by reference to its own terms. The more logical interpretation of those terms is that the Legislature authorized cooperative or municipally owned electric utilities to aggregate their resources in order to meet the local clearing requirement. We will not infer from the Legislature's failure to impose the local clearing requirement on individual alternative electric suppliers, i.e. the Legislature's *silence*, that it, in fact, intended to impose the local clearing requirement on individual alternative electric suppliers. Given that "Michigan courts determine the Legislature's intent from its *words*, not from its silence," *Donajkowski v Alpena Power Co*, 460 Mich 243, 261; 596 NW2d 574 (1999), the better understanding is, as we have articulated it here, that the Legislature's reference to MISO's standards, which allow the local clearing requirement to be met on a zonal basis, and *no language* imposing the local clearing requirement on individual alternative electric suppliers, means that the MPSC is without authority to impose such a requirement upon individual alternative electric suppliers.

to impose a local clearing requirement upon individual alternative electric suppliers. See *Herrick Dist Library*, 293 Mich App at 582-583.

D. LEGISLATIVE HISTORY

We further conclude that, were it necessary to look outside the language of the statute in this case to ascertain the intent of the Legislature, the order of the MPSC conflicts with the intent of Act 341 as reflected in that statute's legislative history. When construing a statute, this Court is required to give effect to the intent of the Legislature. *Russel v Detroit*, 321 Mich App 628, 637; 909 NW2d 507 (2017). When statutory language is clear, the intent of the Legislature is clear and we will enforce the statute as written. *Id*. We look outside the plain words of the statute only when ambiguity within the statute requires it, and we do not use legislative history to cloud clear statutory text. *In re Certified Question from US Court of Appeals for Sixth Circuit*, 468 Mich 109, 116; 659 NW2d 596 (2003). A statute is ambiguous only if it creates an irreconcilable conflict with another statutory provision or if its language is equally susceptible to more than one meaning. *Village of Holly v Holly Twp*, 267 Mich App 461, 474; 705 NW2d 532 (2005).

As discussed, any authority granted by statute to the MPSC must be conferred by "clear and unmistakable language," *Consumers Power Co*, 460 at 155-156, and "the powers specifically conferred on an agency cannot be extended by inference." *Herrick Dist Library*, 293 Mich App at 582-583. Here, because the language of MCL 460.6w is unambiguous, we interpret the plain language as reflecting the intent of the Legislature without the need to consider the legislative history, and conclude that MCL 460.6w contains no clear and unmistakable language granting the MPSC authority to impose a local clearing requirement upon individual alternative electric suppliers. The MPSC, however, invites us to interpret the statute as permitting it to assume authority not explicit within the statute. We conclude that even if it were necessary in this case to look beyond the language of the statute to ascertain the intent of the Legislature, the interpretation suggested by the MPSC conflicts with the Legislature's intent when enacting MCL 460.6w as evident in the legislative history of Act 341.

We note that not all legislative history is equally valuable when attempting to ascertain the legislative intent behind statutory language. *In re Certified Question*, 468 Mich 109 at 115 n 5. Our Supreme Court has instructed that the "highest quality of legislative history [is] that [which] relates to an action of the Legislature from which a court may draw reasonable inferences about the Legislature's intent," which includes "actions of the Legislature in considering various alternatives in language in statutory provisions before settling on the language actually enacted." *Id*.

Here, the legislative process leading to the passage of Act 341 lasted for almost 17 months, and involved numerous amendments and bill substitutes. Senate Bill 437 was introduced on July 1, 2015, and proposed substantial amendment of the Michigan Public Service Commission Act, 1929 PA 3, and the Customer Choice and Electricity Reliability Act, 2000 PA 141 and 142. The bill ultimately emerged from the Senate as Senate Substitute 7 (S7), with a new provision that imposed a capacity obligation and demonstration process on alternative electric suppliers, who were required to own or contract for enough capacity resources to meet a

percentage of their proportionate share of the local clearing requirement. For example, S7 provided in section (2)(c), in relevant part:

> An alternative electric supplier, . . . shall . . . demonstrate to the Commission, in a format determined by the commission, that for the planning year . . . the alternative electric supplier, . . . has contractual rights to sufficient dedicated and firm electric capacity to meet the equivalent of 90% of its proportional share of the local clearing requirement.

This version of the bill passed the Senate and was transmitted to the House. On December 15, 2016, the House adopted H4 in place of S7. H4 *removed* the specific language requiring individual alternative electric suppliers to meet a percentage of their proportionate share of the local clearing requirement. H4 also added language to section 6w(6) specifying that an alternative electric supplier could meet its overall capacity obligation with any resource that the appropriate independent system operator [MISO] allows to meet the capacity obligation. The Senate thereafter concurred in H4 and the bill was signed into law. The Legislature thereby rejected statutory language imposing the local clearing requirement upon individual alternative electric suppliers in favor of statutory language that adopts the MISO method of not imposing the local clearing requirement upon individual electric providers.

In its September 15, 2017 order, the MPSC stated:

> The Commission acknowledges that previous versions of the legislation included a detailed methodology relative to determining the share of a forward locational requirement each provider would have to demonstrate. What changed . . . is not that a locational requirement went away entirely, but that an explicit methodology was removed and replaced with provisions that leave decisions on the methodology of how to establish the locational requirement up to the Commission. . . . [T]he statute gives the Commission flexibility to determine how best to establish a forward locational requirement and the resources that qualify to meet that requirement.

On appeal, the MPSC suggests that "once the Legislature had MISO's . . . long-term resource adequacy plan to use as a guide, Legislators no longer felt the need to provide their own different plans for how to allocate [local clearing requirements] and PRMR," as is apparent from "the addition of requirements that the Commission request MISO's assistance in setting capacity determination and deference to MISO's determinations of what resources would qualify." In sum, the MPSC urges us to read into the statute an implied grant of authority to the MPSC to impose a local clearing requirement on individual alternative electric suppliers even though (1) such authority is not clearly and unmistakably granted by the statute, (2) such an interpretation is contrary to the directive of section 6w that the local clearing requirement be imposed in accordance with MISO's practices, which do not impose the local clearing requirement on individual alterative electric suppliers, and even though (3) the Legislature rejected language granting such authority to the MPSC, removing it from the final draft of the statute ultimately enacted. We decline the invitation to engage in these interpretive gymnastics and return to our ultimate concern and primary objective when reviewing an agency decision interpreting a statute,

which is the proper construction of the plain language of the statute and to discern and give effect to the Legislature's intent. *Rovas*, 482 Mich at 108; *City of Coldwater*, 500 Mich at 167.

"Where the Legislature has considered certain language and rejected it in favor of other language, the resulting statutory language should not be held to explicitly authorize what the Legislature explicitly rejected." *Bush v Shabahang*, 484 Mich 156, 173-174; 772 NW2d 272 (2009), quoting *In re MCI Telecom Complaint*, 460 Mich 396, 415; 596 NW2d 164 (1999). We therefore will not interpret the language adopted in MCL 460.6w as authorizing what the Legislature explicitly rejected when enacting that statute.

E. ADMINISTRATIVE PROCEDURES ACT

Energy Michigan also contends that the MPSC, through its September 15, 2017 order, made a series of decisions that are essentially a set of improperly instituted rules. An administrative rule is "an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency." MCL 24.207. An agency should resort to formal APA rulemaking when establishing policies that "do not merely interpret or explain the statute or rules from which the agency derives its authority," but rather "establish the substantive standards implementing the program." *Faircloth v Family Independence Agency*, 232 Mich App 391, 403-404; 591 NW2d 314 (1999). Under the APA, a "rule" does not include a "rule or order establishing or fixing rates or tariffs," MCL 24.207(c), a "determination, decision, or order in a contested case," MCL 24.207(f), an "interpretive statement" or "guideline," MCL 24.107(h), or a "decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected," MCL 24.207(j). "[I]n order to reflect the APA's preference for policy determinations pursuant to rules, the definition of 'rule' is broadly construed, while the exceptions are to be narrowly construed." *AFSCME v Dep't of Mental Health*, 452 Mich 1, 10; 550 NW2d 190 (1996). An agency, however, may not avoid the requirements for promulgating rules by issuing its directives under different labels. See *id*. at 9. Whether an agency policy is invalid because it was not promulgated as a rule under the APA is reviewed by this Court de novo. *In re PSC Guidelines for Transactions Between Affiliates*, 252 Mich App 254, 263; 652 NW2d 1 (2002).

In this case, Energy Michigan contends that the MPSC, in its September 15, 2017 order, in determining that it could impose a local clearing requirement upon individual alternative electric suppliers, in essence enacted rules without complying with the APA. Energy Michigan identifies six such alleged instances, which Energy Michigan notes is not an all-inclusive list, being:

> a. Establishment of a formula for determining each electric provider's "total capacity obligation that it will be required to demonstrate that it has owned or contracted resources to satisfy."
>
> b. A restriction on the use of the MISO Planning Resource Auction to meet capacity needs, where the Commission states that it "is also allowing electric providers to plan on up to 5% of their portfolio to be acquired through MISO's annual capacity auction" where no such restriction formerly existed.

c. Setting of the capacity obligation for the years 2018 and 2021 on the basis of the electric providers' Peak Load Contribution ("PLC") for 2018, without any means to adjust that obligation during the four years, by requiring that "[t]hese PLC determinations will ultimately drive the total amount of capacity obligation that an AES will be required to meet in its annual demonstration before the Commission."

d. Imposing a locational requirement for obtaining capacity on individual electric providers which will be required for the 2019 demonstration, by affirming "the Commission's interpretation that a locational requirement is authorized and may be applied to individual electric providers."

e. Asserting authority to reinsert by administrate fiat requirements that were removed from the authorizing statute during the legislative drafting process.

f. And ordering that "[t]he Capacity Demonstration Process and Requirements attached hereto as Attachment A, are approved" without having developed those requirements through the proper rulemaking process.

These allegations of inappropriate rulemaking primarily relate to the MPSC imposing a local clearing requirement on individual alternative electric suppliers.[9] Because we determine that the statute does not provide the MPSC the authority to impose a local clearing requirement on individual alternative electric suppliers, we conclude that it is unnecessary to reach the related issue whether the MPSC's determination concerning the local clearing requirement are improperly promulgated rules.

[9] Energy Michigan's challenges under the APA are tied almost entirely to its challenge to the MPSC's imposition of the local clearing requirement on individual electric suppliers. In its Reply Brief to Consumers, Energy Michigan asserts that "[w]hat Energy Michigan is disputing (setting aside the MPSC's unlawful process for implementing its new rules, . . .) is whether or not the Commission has the authority to go beyond MISO's zonal LCR and establish a mandatory individual LCR for each electric provider, something that MISO has not done and that is not present in the federal reliability requirement, but would be a new and unique state-level innovation." We agree with Energy Michigan that this is the focus of the parties' dispute and the nearly exclusive focus of the parties' briefing. To the extent that the challenges under the APA range beyond the question of the local clearing requirement, we decline to reach those issues as not sufficiently developed in light of the brevity of the treatment of those challenges by all parties.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael F. Gadola
/s/ Patrick M. Meter
/s/ Jonathan Tukel

Attachment 2

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the investigation, on the Commission's own motion, into the electric supply reliability plans of Michigan's electric utilities for the years 2017 through 2021.	)))))	Case No. U-18197

At the September 15, 2017 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Sally A. Talberg, Chairman
Hon. Norman J. Saari, Commissioner
Hon. Rachael A. Eubanks, Commissioner

ORDER

This order establishes the format and requirements for electric providers in the state to make demonstrations to the Commission that they have sufficient electric capacity arrangements pursuant to Section 6w of 2016 PA 341 (Act 341).

1. History of Proceedings

Beginning in 1998, the Commission commenced annual investigations into the adequacy and reliability of the electric generation capacity available for meeting customer requirements in the Consumers Energy Company (Consumers), DTE Electric Company (DTE Electric), and Indiana Michigan Power Company (I&M) service territories. The Commission expanded its annual capacity investigations over time to, among other things, include all Michigan-regulated electric utilities, including member-regulated cooperatives, and extend the horizon to a five-year period, in light of expected power plant retirements in Michigan and the Midwest region.

As in past years, the Commission opened Case No. U-18197 on January 12, 2017, to obtain from electric utilities regulated by the Commission, alternative electric suppliers (AESs), utility affiliates, and certain power supply cooperatives and associations, a self-assessment of their ability to meet their customers' expected electric requirements and associated planning reserves during the five-year period of 2017 through 2021.

On December 21, 2016, Governor Rick Snyder signed Act 341 into law. Section 6w of Act 341 requires each electric utility, AES, cooperative electric utility, and municipally-owned electric utility to demonstrate to the Commission, in a format determined by the Commission, that the load serving entity (electric provider) owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the appropriate independent system operator (ISO), or by the Commission, as applicable. MCL 460.6w. In the event an AES cannot make the required capacity showing (or elects not to), Section 6w requires that a State Reliability Mechanism (SRM) capacity charge would be assessed, to be determined by the Commission, with the associated capacity for such AES customers provided by the incumbent utility. Thus, Section 6w mandated a new form of annual capacity investigation, with associated new deadlines. Act 341 went into effect on April 20, 2017.

Recognizing this, on March 10, 2017, the Commission issued an order in Case Nos. U-18239 *et al*. (March 10 order) that directed the Commission Staff (Staff) to consult with Midcontinent Independent System Operator, Inc. (MISO) and other parties to:

> 1. Continue to examine resource adequacy issues as part of the annual assessment in Case No. U-18197.
>
> 2. Develop recommendations regarding requirements for capacity demonstrations for electric utilities, cooperatives, municipalities, and AESs in this state subject to the SRM, including filing requirements.
>
> 3. Develop recommendations regarding load forecasts, planning reserve margin requirements and locational requirements for capacity resources.

> 4. Develop recommendations regarding the capacity obligations for load that pays an SRM charge to a utility, including MISO's annual PRA [Planning Resource Auction or auction].

March 10 order, p. 19. In light of the compressed schedule mandated by Section 6w and the need for certainty to plan for capacity requirements, as well as the directive from the Legislature to establish the capacity obligations for all providers, including areas with and without electric choice, the Commission engaged stakeholders through briefing and technical conferences to solicit input on the capacity obligations. The Commission also opened dockets in Case Nos. U-18239, U-18248, U-18253, U-18254, and U-18258 for the five electric providers with choice load potentially affected by the SRM charge requirement of Section 6w.

On May 11, 2017, the Commission issued a follow-up order in Case Nos. U-18197 *et al.* finding that the format for the demonstration required of an electric utility by MCL 460.6w(8)(a) that the utility "owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the appropriate independent system operator, or commission, as applicable" for the "planning year beginning 4 years after the beginning of the current planning year" would be determined through collaborative efforts in the technical conferences, along with the format for the demonstrations required of AESs, cooperative electric utilities, and municipally-owned electric utilities under MCL 460.6w(8)(b) (May 11 order). In the May 11 order, the Commission also afforded stakeholders the opportunity to provide comments and reply comments regarding three threshold issues that concerned timing, a uniform methodology, and a locational requirement.[1] The order directed the Staff to file a Staff Report (Report) on August 1, 2017,[2] with

[1] Attachment A to the May 11 order included a list of additional issues for consideration during the technical conferences.

[2] On June 30, 2017, the Staff filed a separate report reviewing the data submitted by providers and reporting on the overall capacity outlook for Michigan under the pre-Act 341 framework for

recommendations and an explication of unresolved issues; and indicated that parties could file comments on the Report by August 15, 2017, and reply comments by August 30, 2017.

On June 15, 2017, the Commission issued an order addressing the threshold questions (June 15 order). The Commission found that: (1) the capacity demonstrations should be filed in accordance with the deadlines established in Section 6w(8); (2) a uniform methodology should be applied to all electric providers and service territories; (3) Section 6w authorizes a locational requirement to be applied to individual electric providers, but allocating such a requirement based on individual electric providers' proportional share of the peak load may not be equitable or reasonable; and (4) the remaining technical conferences should be used to address the appropriate design of a locational requirement for capacity obligations.

Technical conferences took place on April 11, April 26, June 8, June 29-30, and July 10, 2017. All stakeholders who wished to do so filed written position statements by July 17, 2017.

On August 1, the Staff filed the Report. On August 15, 2017, MISO, DTE Electric, the Association of Businesses Advocating Tariff Equity (ABATE), Energy Michigan, the Grand Rapids Area Chamber of Commerce (GRACC), Michigan Chemistry Council (MCC), Wolverine Power Cooperative, Inc. (Wolverine), Representative Gary Glenn, Constellation NewEnergy, Inc. (CNE), and the Michigan Municipal Electric Association, Michigan Public Power Agency, Michigan South Central Power Agency, and WPPI Energy (collectively the Michigan Municipal Group or MMG) filed comments on the Report. On August 30, 2017, MISO, United States Steel

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the 2017 through 2021 time period. On July 31, 2017, the Commission issued an order reviewing the capacity outlook and closing that original part of the Case No. U-18197 docket opened on January 12, 2017.

Corporation (USSC), MCC, DTE Electric, Consumers, CNE, and Energy Michigan filed reply comments.

2. Federal and State Regulatory Background

Section 6w established a new framework for resource adequacy in Michigan – that is, ensuring electric providers can meet customers' electricity needs over the long term even during periods of high electricity consumption or when power plants or transmission lines unexpectedly go out of service. Both the states and the Federal Energy Regulatory Commission (FERC) have jurisdiction over resource adequacy. FERC has explained:

> [T]he question of jurisdiction over resource adequacy is a complex matter that represents "the confluence of state-federal jurisdiction." [Note omitted.] While we are cognizant of the traditional role of state and local entities in regulating resource adequacy, we are also aware of our responsibility under the FPA [Federal Power Act] to ensure the reliability of the system and that wholesale rates are just and reasonable. We will defer to state and local entities' decisions when possible on resource adequacy matters, but in doing so we will not shirk our congressionally-mandated responsibilities. We find that the adequacy of resources can have a significant effect on wholesale rates and services and therefore is subject to Commission jurisdiction.

California Independent System Operator Corp (CAISO), 119 FERC ¶ 61,076 at P 540, p. 212 (2007); *see, also, ISO New England, Inc.*, 121 FERC ¶ 61,125 at P 47, p. 13 (2007), and *CAISO*, 116 FERC ¶ 61,274 at P 1112, p. 305 (2006). States can set both the amount of capacity each electric provider is required to have available for reliability and how that capacity requirement should be met. *Id.* Notwithstanding, FERC has clarified its role in reviewing the impact that such state determinations have upon interstate rates and the capacity resource mechanism approved by FERC. *See, Connecticut Dept of Pub Utility Control Bd v FERC*, 569 F3d 477 (DC Cir 2009).

FERC also explicitly recognized the authority of states over resource adequacy in approving the MISO resource adequacy construct. *See,* 16 USC 824(a), (b)(1); *Midwest Indep Transmission System Operator, Inc.*, 153 FERC ¶ 61,229, pp. 23-24 (2015). MISO's capacity market is

intended to complement state resource adequacy authorities and actions, such as retail rate regulation of vertically-integrated utilities and integrated resource planning. *Id.* The MISO capacity market serves as a mechanism to sell and buy capacity in the near-term (i.e., current year) through a centralized auction to allow for a more efficient exchange of planning resources across energy providers and local planning zones.

The MISO capacity auction is conducted at the end of March each year, and allows for the purchase and sale of capacity for the upcoming year, referred to as a planning year, which runs from June 1 through May 31 of the following year. Each year, MISO establishes the planning reserve margin requirement (PRMR), or the amount of capacity each electric provider must acquire to reliably serve projected peak demand. In lieu of participating in the auction, an electric provider can submit a fixed resource adequacy plan (FRAP) demonstrating it has sufficient capacity, and/or pay a capacity deficiency charge. Each year, MISO also establishes the local clearing requirement (LCR), which represents the minimum amount of generation that must be physically located within the local resource zone (Zone) in order to meet reliability criteria (a one day in ten year loss of load expectation (LOLE)) after taking into account import capability.[3]

MISO has established ten Zones in its footprint to accomplish this purpose. Even though the bulk transmission system can transport electricity over long distances, congestion and other constraints can affect the deliverability of resources to customer load, which impacts system reliability. MISO incorporated the LCR into its resource adequacy construct at the direction of FERC in order to account for these constraints and better ensure reliability of the electric grid.

[3] "Local Clearing Requirements" are defined as "the minimum amount of Unforced Capacity [UCAP] that is physically located within the Zone that is required to meet the LOLE while fully using the Capacity Import Limit [capacity import limit] for such Zone." FERC Electric Tariff, Module E-1, 1.365a, Local Clearing Requirement, 1.0.0.

Midwest Indep Transmission System Operator, Inc., 139 FERC ¶ 61,199, p. 41 (2012); 153 FERC ¶ 61,229, pp. 23-24 (2015).

In order to make the determination of the LCR, MISO first establishes the local reliability requirement (LRR), which represents the resources that would be needed if a particular local resource zone were an island – i.e., if there was no ability to import resources over the bulk transmission system – to meet the one day in ten years LOLE standard. MISO also determines the capacity import limit, which represents the availability of transmission capacity to import resources into a local resource zone. By subtracting the capacity import limit from the LRR, MISO determines the LCR.

The LCR applies to the entire Zone, with the zonal auction prices affected if this requirement is not met. Specifically, entities participating in the auction, whether through the self-supply option or not, would be required to pay the cost of new entry (CONE), which is based on the cost of construction of new gas combustion turbine generation, if the local planning zone as a whole does not meet the LCR. In other words, if there are not enough resources physically located in the Zone to meet the LCR, then the auction price automatically goes to the cost of new entry. In such instance, the probability of an outage due to lack of supply may be higher because the MISO auction only serves as a financial mechanism and does not ensure new capacity resources will be secured to meet the reliability standards.

If an electric provider uses a FRAP in lieu of participating in the auction, the FRAP must demonstrate that the electric provider's proportional share of the Zone's LCR is met using resources located in that local Zone or otherwise count toward that Zone's LCR under MISO's

tariff.[4] Currently, the LCR in Zone 7,[5] covering most of the Lower Peninsula, represents approximately 95% of the overall PRMR; thus, the large majority of resources must be physically located in the Zone in order for the LCR to be met.

A level of complexity is added to issues related to resource adequacy in Michigan due to the state's unique retail electric market structure, where up to 10% of load in an incumbent utility's service territory is allowed to purchase electricity from an AES under Michigan's electric choice law. Incumbent utilities plan to have adequate capacity to serve their full-service customers, but have made a point of not taking steps to plan for choice load located in their service territories. See, note 10, *infra*. AESs that rely on the annual MISO auction to procure the capacity necessary to cover all or some of their customers' needs for the upcoming summer period can do so at below cost because of the historical surplus of supplies. The MISO auction prices have been far below the cost of existing or new generation. Thus, an AES that relies on the auction for its capacity needs may not technically be using the generation of investor-owned utilities in Michigan to meet its customers' short-term capacity needs, but it is using excess supply at below-cost from other entities in the MISO footprint. Under this system, an AES that relies heavily on annual auction purchases is saving its customers money in the short term, but is not contributing to reliability like other electric providers that are planning and investing in resources to meet long-term needs. And

[4] MISO's tariff currently allows resources located in another local resource zone to count toward the importing zone's LCR if adequate transmission service is obtained and approved by MISO. Discussions are underway at MISO to potentially modify or eliminate this provision.

[5] Zone 7 covers the Lower Peninsula of Michigan, with the exception of the southwest corner of the state, which is in PJM Interconnection, LLC's (PJM) territory. The Upper Peninsula is in Zone 2.

as supplies tighten with the potential for costs to increase through the auction, there are cost impacts to Michigan utility customers.[6]

MISO and other entities have explained that the MISO market, on its own, does not provide the necessary price signals to new or existing generators in order to meet long-term resource adequacy needs.[7] Additionally, it only addresses the current planning year. FERC has also identified inadequate price signals, or "price formation," in wholesale markets as a concern for electric reliability and the efficient entry and exit of generators. The U.S. Department of Energy recently emphasized this issue in its study on baseload generation.[8] The issue of price formation is more pronounced in areas with retail electric choice because power supplies are generally deregulated. This concern was the impetus for MISO to propose the Competitive Retail Solution, or CRS, with a three-year forward auction for areas with retail electric choice (i.e., Illinois and portions of Michigan). FERC rejected the CRS proposal in February 2017, citing concerns with the market design.[9]

Concerns about the ability of the existing resource adequacy construct to ensure reliability were echoed by the Legislature and Governor in enacting new energy legislation. In 2016,

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[6] Even the potential that the auction price may rise due to the supply outlook in Zone 7 may affect the ability or cost to purchase capacity from suppliers outside of Michigan several years into the future. This is due in part to MISO's zonal deliverability charge that would be applied to a bilateral purchase included in a FRAP.

[7] See, http://www.senate.michigan.gov/committees/files/2016-SCT-ENERGY-04-27-1-01.PDF; and https://www.misoenergy.org/Library/Repository/Report/IMM/2015%20State%20of%20the%20Market%20Report.pdf

[8] https://energy.gov/sites/prod/files/2017/08/f36/Staff%20Report%20on%20Electricity%20Markets%20and%20Reliability_0.pdf

[9] *Midcontinent Independent System Operator, Inc.*, 158 FERC ¶ 61,128 (2017**).**

Michigan enacted the new statutory framework for resource adequacy in Section 6w of Act 341 to ensure that all energy providers – including AESs, municipal utilities, electric cooperatives, and regulated electric utilities – contribute to the state's long-term electric capacity needs. The legislation expressly provided for the implementation of MISO's CRS proposal but also included the State Reliability Mechanism as the backstop in the event the CRS was not approved by FERC by a date certain. The application of charges under the SRM is limited to areas with retail electric choice (choice), but is reliant on the capacity demonstration requirements and processes applicable to all areas and energy providers in the state.

Under this capacity demonstration framework, the Commission must determine the capacity obligations for individual electric providers over a four year period and create a process to evaluate whether such obligations are met. In setting the obligations, the law directs the Commission to request technical assistance from MISO in determining the LCR and PRMR for purposes of the Section 6w capacity obligations. Notably, the LCR and PRMR would cover periods beyond MISO's one-year planning year and auction. Section 6w provides remedies in instances when an electric provider is unable to demonstrate it has procured adequate capacity to cover its load, including allowing for uncovered AES load to be assessed a capacity charge (i.e., the SRM charge) determined by the Commission and paid to the incumbent utility in exchange for meeting that load's capacity obligations. Special provisions exist for electric utilities, municipally-owned utilities, and electric cooperatives that fail to meet the Section 6w capacity obligations.

Pertinent subsections of MCL 460.6w related to the capacity obligations and process are as follows:

> (2) . . . If, by September 30, 2017, the Federal Energy Regulatory Commission does not put into effect a resource adequacy tariff that includes a capacity forward auction or a prevailing state compensation mechanism, then the commission shall establish a state reliability mechanism under subsection (8). The commission may commence a

proceeding before October 1 if the commission believes orderly administration would be enabled by doing so. If the commission implements a state reliability mechanism, it shall be for a minimum of 4 consecutive planning years beginning in the upcoming planning year. A state reliability charge must be established in the same manner as a capacity charge under subsection (3) and be determined consistent with subsection (8). . . .

(6) A capacity charge shall not be assessed for any portion of capacity obligations for each planning year for which an alternative electric supplier can demonstrate that it can meet its capacity obligations through owned or contractual rights to any resource that the appropriate independent system operator allows to meet the capacity obligation of the electric provider. The preceding sentence shall not be applied in any way that conflicts with a federal resource adequacy tariff, when applicable. Any electric provider that has previously demonstrated that it can meet all or a portion of its capacity obligations shall give notice to the commission by September 1 of the year 4 years before the beginning of the applicable planning year if it does not expect to meet that capacity obligation and instead expects to pay a capacity charge. The capacity charge in the utility service territory must be paid for the portion of its load taking service from the alternative electric supplier not covered by capacity as set forth in this subsection during the period that any such capacity charge is effective. . . .

(8) If a state reliability mechanism is required to be established under subsection (2), the commission shall do all of the following:

(a) Require, by December 1 of each year, that each electric utility demonstrate to the commission, in a format determined by the commission, that for the planning year beginning 4 years after the beginning of the current planning year, the electric utility owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the appropriate independent system operator, or commission, as applicable.

(b) Require, by the seventh business day of February each year, that each alternative electric supplier, cooperative electric utility, or municipally owned electric utility demonstrate to the commission, in a format determined by the commission, that for the planning year beginning 4 years after the beginning of the current planning year, the alternative electric supplier, cooperative electric utility, or municipally owned electric utility owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the appropriate independent system operator, or commission, as applicable. One or more municipally owned electric utilities may aggregate their capacity resources that are located in the same local resource zone to meet the requirements of this subdivision. One or more cooperative electric utilities may aggregate their capacity resources that are located in the same local resource zone to meet the requirements of this subdivision. A cooperative or municipally owned electric utility may meet the requirements of this subdivision through any resource, including a resource acquired through a capacity forward

auction, that the appropriate independent system operator allows to qualify for meeting the local clearing requirement. A cooperative or municipally owned electric utility's payment of an auction price related to a capacity deficiency as part of a capacity forward auction conducted by the appropriate independent system operator does not by itself satisfy the resource adequacy requirements of this section unless the appropriate independent system operator can directly tie that provider's payment to a capacity resource that meets the requirements of this subsection. By the seventh business day of February in 2018, an alternative electric supplier shall demonstrate to the commission, in a format determined by the commission, that for the planning year beginning June 1, 2018, and the subsequent 3 planning years, the alternative electric supplier owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the appropriate independent system operator, or commission, as applicable. If the commission finds an electric provider has failed to demonstrate it can meet a portion or all of its capacity obligation, the commission shall do all of the following:

(i) For alternative electric load, require the payment of a capacity charge that is determined, assessed, and applied in the same manner as under subsection (3) for that portion of the load not covered as set forth in subsections (6) and (7). If a capacity charge is required to be paid under this subdivision in the planning year beginning June 1, 2018 or any of the 3 subsequent planning years, the capacity charge is applicable for each of those planning years.

(ii) For a cooperative or municipally owned electric utility, recommend to the attorney general that suit be brought consistent with the provisions of subsection (9) to require that procurement.

(iii) For an electric utility, require any audits and reporting as the commission considers necessary to determine if sufficient capacity is procured. If an electric utility fails to meet its capacity obligations, the commission may assess appropriate and reasonable fines, penalties, and customer refunds under this act.

(c) In order to determine the capacity obligations, request that the appropriate independent system operator provide technical assistance in determining the local clearing requirement and planning reserve margin requirement. If the appropriate independent system operator declines, or has not made a determination by October 1 of that year, the commission shall set any required local clearing requirement and planning reserve margin requirement, consistent with federal reliability requirements.

(d) In order to determine if resources put forward will meet such federal reliability requirements, request technical assistance from the appropriate independent system operator to assist with assessing resources to ensure that any resources will

> meet federal reliability requirements. If the technical assistance is rendered, the commission shall accept the appropriate independent system operator's determinations unless it finds adequate justification to deviate from the determinations related to the qualification of resources. If the appropriate independent system operator declines, or has not made a determination by February 28, the commission shall make those determinations. . . .

(11) Nothing in this act shall prevent the commission from determining a generation capacity charge under the reliability assurance agreement, rate schedule FERC No. 44 of the independent system operator known as PJM Interconnection, LLC, as approved by the Federal Energy Regulatory Commission in docket no. ER10-2710 or similar successor tariff.

(12) As used in this section:

> (a) "Appropriate independent system operator" means the Midcontinent Independent System Operator. . . .
>
> (c) "Electric provider" means any of the following:
> (i) Any person or entity that is regulated by the commission for the purpose of selling electricity to retail customers in this state.
> (ii) A municipally owned electric utility in this state.
> (iii) A cooperative electric utility in this state.
> (iv) An alternative electric supplier licensed under section 10a.
>
> (d) "Local clearing requirement" means the amount of capacity resources required to be in the local resource zone in which the electric provider's demand is served to ensure reliability in that zone as determined by the appropriate independent system operator for the local resource zone in which the electric provider's demand is served and by the commission under subsection (8).
>
> (e) "Planning reserve margin requirement" means the amount of capacity equal to the forecasted coincident peak demand that occurs when the appropriate independent system operator footprint peak demand occurs plus a reserve margin that meets an acceptable loss of load expectation as set by the commission or the appropriate independent system operator under subsection (8). . . .
>
> (h) "State reliability mechanism" means a plan adopted by the commission in the absence of a prevailing state compensation mechanism to ensure reliability of the electric grid in this state consistent with subsection (8).

Case Nos. U-18239, U-18248, U-18253, U-18254, and U-18258 are dockets in which the Commission will determine the capacity charge, if any, associated with choice load affected by Section 6w by December 1, 2017. Whether any capacity charge is actually imposed will be

determined after February 9, 2018, when AESs make their capacity demonstrations. The definitions of LCR and PRMR in Section 6w(12) explicitly acknowledge the role of the Commission in setting the LCR and PRMR under subsection (8) for purposes of Section 6w. Thus, in the June 15 order, pp. 10-11, the Commission directed the Staff and stakeholders to explore and attempt to define an allocation methodology for a locational requirement in the remaining technical conferences. The Commission suggested consideration of two possible approaches – one being to phase-in requirements over time, and another based on identifying the incremental capacity needed in the Zone in order to meet the PRMR and LCR over a longer term.

3. The Staff Report

A. Areas of Apparent Agreement

The Staff begins by describing the areas where consensus among the stakeholders appeared to have been reached, as follows:

> 1. In the fall of 2017, one shared docket should be opened for all LSEs to file initial capacity demonstrations for planning years 2018 through 2022.
>
> a. Once the LESs have filed demonstrations, Staff will review and issue recommendations to the Commission and the Commission will decide if the initial demonstration is sufficient.
>
> b. Prior to filing demonstrations, LSEs would like an informal "pre-filing window" where they may informally consult with Staff on whether they need to submit additional support.
>
> 2. The Planning Reserve Margin Requirement (PRMR) and Local Clearing Requirement (LCR) shall be based on data from MISO's Loss of Load Expectation (LOLE) report and determined using interpolation/extrapolation where necessary.
>
> a. There should be a short comment period after Staff files the PRMR and LCR report in the docket.
>
> b. Parties would like an educational meeting with Staff regarding the PRMR and LCR determinations, with the ability to ask Staff questions about the determination.
>
> 3. The statute sets a four year forward obligation.
>
> 4. Possible area of consensus: 20+ year municipal contracts that were entered into prior to the development of MISO local resource zones (LRZs) should be grandfathered in towards meeting any locational requirement that may be adopted. Michigan South Central Power

Agency has 30.5 MW of such contracts. (Cannelton Hydro – 2007 bought into for 40-year life of plant, 5.6 MW; Smithland – 2007 bought into for 40-year life of plant, 4.9 MW; Prairie State – 2007 bought into for 40-year life of plant, 12 MW; Menomonee [sic] – LRZ 2 Hydro 20-year power purchase agreement, 4.4 MW; Oconto Falls – LRZ 2 Hydro 2-year power purchase agreement, 3.6 MW.)

a. DTE supported this concept during the technical conference.

b. Consumers Energy's written position statement provides a statement of non-objection to this concept.

5. What does a LSE have to show in the capacity demonstration for new generation?

a. Case-by-case determination.

b. Completed MISO Generation Interconnection Agreement or Certificate of Necessity is not necessary.

c. Four years out, at a minimum, an officer affidavit plus an additional evidence of intent, such as hiring an engineering study, etc.

d. Two years out the LSE would have to make a more substantial showing of progress, such as participating in the MISO generator interconnection queue, request for proposal process, or similar forward-moving demonstration.

e. If Staff is not satisfied with a 2-year-out demonstration, Staff should request that a show cause contested case be initiated.

f. If the project fails to materialize, but the LSE can replace the project with a power purchase agreement or other resource that would have initially qualified, there should be no consequences for failing to do the project.

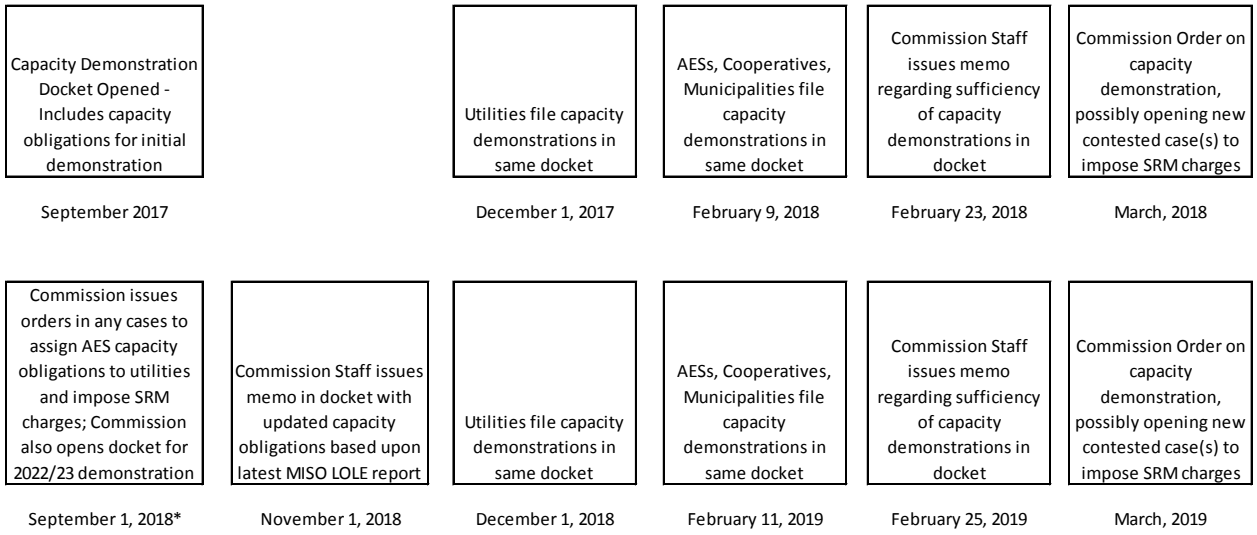
6. Unforeseen shortages that arise in the interim years, after a satisfactory demonstration had been made four years forward, will be handled through the PRA [auction] without consequence.

7. Demand Response resources meeting MISO capacity requirements would qualify towards meeting the four-year forward capacity demonstration.

Report, pp. 3-4. In light of the consensus areas, the Staff proposes a capacity demonstration process timeline reflecting actions and filings needed in the September 2017 to March 2019

timeframe, as follows:

Capacity Demonstration Process



* process would repeat annually

Report, p. 5. The Staff recommends that the Commission issue an order opening a single docket in the fall of 2017 for the filing of the initial capacity demonstrations for planning years 2018/2019 through 2021/2022. The Staff indicates that the stakeholders agreed to use data from the most recent MISO LOLE study, using interpolation and extrapolation methods when appropriate, and recommends use of those methods to determine the PRMR and LRR for each Zone in Michigan, applying the most recently published capacity import limit as follows:

> Staff recommends calculating the LCR as the LRR minus CIL. Staff acknowledges that applying this calculation to the data in the 2017 MISO LOLE Study, the resulting LCR for LRZ 7 does not precisely match the LCR for LRZ 7 that MISO reported as part of the auction in 2017. Staff stresses that the need to communicate obligations in a timely fashion that have been determined in a transparent repeatable manner far outweighs the need for absolute precision. Based upon the most recently published LOLE study by MISO, Staff proposes the following data be utilized for capacity obligations for the initial capacity demonstration for planning years 2018/19 through 2021/22.

MISO Zone 2										
Year	17/18	18/19	19/20	20/21	21/22	22/23	23/24	24/25	25/26	26/27
	0	1	2	3	4	5	6	7	8	9
Load	12399	12399	12399	12399	12399					
PRM(UCAP)	**7.8%**	**7.5%**	**7.3%**	**7.3%**	**7.4%**	**7.5%**	**7.6%**	**7.6%**	**7.7%**	**7.8%**
PRMR	13366	13329	13304	13304	13316					
LRR	**14495**	14604	**14712**	14767	14822					**15098**
CIL	**2075**	2075	2075	2075	2075					
LCR (LRR-CIL)	12420	12529	12637	12692	12747					
LCR/PRMR	92.9%	94.0%	95.0%	95.4%	95.7%					

	MISO Zone 7									
Year	17/18	18/19	19/20	20/21	21/22	22/23	23/24	24/25	25/26	26/27
	0	1	2	3	4	5	6	7	8	9
Load	20682	20682	20682	20682	20682					
PRM(UCAP)	**7.8%**	**7.5%**	**7.3%**	**7.3%**	**7.4%**	**7.5%**	**7.6%**	**7.6%**	**7.7%**	**7.8%**
PRMR	22295	22233	22192	22192	22212					
LRR	**24654**	24620	**24585**	24644	24704					**25001**
CIL	**3320**	3320	3320	3320	3320					
LCR (LRR-CIL)	21334	21300	21265	21324	21384					
LCR/PRMR	95.7%	95.8%	95.8%	96.1%	96.3%					

Report, pp. 5-6 (notes omitted). The Staff recommends including five years of projected load and resources (as has been requested in recent capacity investigations), and use of the same forms for reporting purposes as were used in the capacity investigation part of this docket.

For the initial four planning years (which are treated as a single time period by the Staff for purposes of the capacity obligations under Section 6w), and for every fourth planning year thereafter, the Staff recommends the following minimum guidelines for making demonstrations:

> **Existing generation (owned)**
>
> Staff recommends that the minimum acceptable support for existing generation that is included in a capacity demonstration include: 1) an affidavit from an officer of the company claiming ownership of the unit(s), including a commitment of the unit(s) to the LSE four years forward, 2) a copy of the existing [Zonal Resource Credit] ZRC qualification of the unit(s) from the MISO Module E Capacity Tracking Tool, and 3) if there are retail tariffs or customer contracts associated with the resources, copies should be provided.

Existing demand response or energy efficiency resources (that have not been netted against load)

Staff recommends that the minimum acceptable support for existing demand response resources or energy efficiency resources that have not already been netted against load include: 1) an affidavit from an officer of the company outlining the resource(s), including a commitment to maintain at least that same level of resources four years forward, 2) a copy of the existing ZRC qualification of the resource(s) from the MISO Module E Capacity Tracking Tool, and 3) if there are retail tariffs or customer contracts associated with the resources, copies should be provided.

New or upgraded generation (owned)

Staff recommends that the minimum acceptable support for proposed new generation include: 1) an affidavit from an officer of the company outlining the detailed plans for the new generation including milestones such as planned in-service date, expected regulatory approval date(s), planned date to enter the MISO generator interconnection queue, expected date for MISO generator interconnection agreement, construction timeline, etc., and 2) documentation supporting the expected ZRC qualification from MISO for the new unit(s), and 3) if there are retail tariffs or customer contracts associated with the resources, copies should be provided. For new generation submitted as part of a capacity demonstration, Staff recommends that all of the above data be updated and submitted on an annual basis with each subsequent capacity demonstration until the unit(s) are in service.

New demand response or energy efficiency resources (that have not been netted against load)

Staff recommends that the minimum acceptable support for new demand response resources or energy efficiency resources that have not already been netted against load included in a capacity demonstration include: 1) an affidavit from an officer of the company outlining the plans for the resource(s), including a commitment to achieve and/or maintain at least that same level of resources four years forward, and 2) specific plans to have the resource(s) qualified by the independent system operator, and 3) if there are retail tariffs or customer contracts associated with the resources, copies should be provided. For new demand response or energy efficiency resources submitted as part of a capacity demonstration, Staff recommends that all of the above data be updated and submitted on an annual basis with each subsequent capacity demonstration until the resource(s) are in service. Final qualification/approval from the independent system operator should be submitted in a subsequent demonstration.

Existing generation (capacity contract)

Staff recommends that the minimum acceptable support for capacity contracts with existing generation include: 1) an affidavit from an officer of the company including a copy of the contract that specifies the unit(s) or pool of generation that is the source of the contract, including the location of the unit(s) or pool. The affidavit should include a

> commitment to maintain the contracted amount four years forward regardless of any early out clauses in the contract, and 2) a copy of the existing ZRC qualification of the unit(s) or pool from the MISO Module E Capacity Tracking Tool that the LSE obtains from the asset owner and includes with the demonstration filing.
>
> **Forward ZRC contracts**
>
> Staff recommends that the minimum acceptable support for forward ZRC contracts include an affidavit from an officer of the company including a copy of the contract that specifies the zonal location of the ZRCs. The affidavit should include a commitment to maintain the contracted amount four years forward regardless of any early out clauses in the contract. A forward ZRC contract that does not specify the zonal location of the ZRCs will be deemed insufficient towards meeting any portion of a locational requirement, unless the LSE provides other alternative support for the location of the ZRCs.

Report, pp. 7-8. With respect to utilization of the MISO auction, the Staff opines that a plan to purchase ZRCs in the auction four years in the future does not constitute a demonstration that the electric provider can meet its capacity obligations. The Staff interprets Section 6w to require that sufficient resources are offered by electric providers in the auction, and not to simply allow electric providers to wait and see if enough ZRCs are offered to meet reliability requirements. Thus, the Staff recommends that the Commission find that the statutory obligation to "own or contract" resources does not include a plan to purchase from the auction in a future year. The Staff suggests that the auction continue to be viewed as a clearing mechanism for electric providers when load variations occur, such that an electric provider can make an auction purchase without fear of penalty when necessary due to exigencies, but the auction cannot be the basis for a complete demonstration.

The Staff recommends that other types of documentation submitted in support of a demonstration be evaluated on a case-by-case basis. Commercially sensitive documentation would continue to be treated confidentially, as it has been in past capacity investigations.

The Staff recommends that it be directed to file a memo in the capacity demonstration docket two weeks after the final demonstrations are filed outlining its findings. A contested case docket,

in the form of an order to show cause (show cause), would be opened for any electric provider that has not made a satisfactory demonstration as soon as practicable after the memo is filed, and the case should be completed within six months from the date of opening. The Staff acknowledges that, for the 2018 planning year, this process will not allow any utility to assume capacity obligations in time for the 2018 MISO auction. However, in future years, "Staff opines that decisions from the Commission by September 1 regarding any capacity obligations being transferred to the utility should provide the utility with sufficient time to make arrangements before its next capacity demonstration on December 1, as well as provide a meaningful amount of time for parties to address the issues in the contested case and develop a record for the Commission's decision." Report, p. 10.

The Staff indicates that it is looking into the development of a Michigan Capacity Tracking Tool, which could provide a process for trading capacity four years forward, but notes that it would not be useful if generators do not participate. The Staff states that it will continue to work with stakeholders to determine whether a capacity tracking tool would be worthwhile.

B. Areas of Apparent Disagreement

The Staff described areas of disagreement as follows:

1. Capacity Demonstration Process
   a. Contested cases with full transparency versus non-contested confidential capacity demonstration filings.
   b. The process and timing for the determination from the Commission regarding the AES demonstrations, particularly for the 2018/19 planning year.

2. Whether forward contracts for Zonal Resource Credits (ZRCs) that are not tied to specific planning resources should meet the requirements for a successful capacity demonstration.

3. Locational Requirement
   a. Whether a LCR should be applicable to individual LSEs or not.
   b. If applicable to individual LSEs, the methodology and amount.

Report, p. 4. Much of the disagreement concerned the locational requirement.

In the June 15 order, the Commission proposed two distinct approaches for implementation of a locational requirement. In the Report, the Staff fleshes out the two approaches and discusses their advantages and disadvantages, without recommending one over the other, noting its opposition to the requirement. *See*, June 15 order, p. 9. The Staff states that "the vast majority of local generation is either owned by or contracted to the rate-regulated utilities," who have little incentive to sell this capacity to other electric providers. Report, p. 13, n. 6.

With respect to the phased-in approach, the Staff begins by positing that any locational requirement imposed in the near term should be attainable. Thus, the Staff recommends an LCR of 0.0% for the two 2018-2020 planning years, 10.0% for the two 2020-2022 planning years, and more significant annual increases thereafter, reaching 94.7% for the 2025/2026 planning year (which would be subject to demonstration in 2022). Report, p. 13. "Staff notes that 94.7% is the current pro-rata share of the LCR requirement for MISO Zone 7 based upon the data in the most recent auction results. This value can and likely will change over time, consistent with changes in generator performance and transmission topography. Staff's proposal is that the steady state value of locational requirements should equal the most current pro-rata share, defined as LCR/PRMR and calculated utilizing the data in the most recent MISO LOLE Study Report." *Id.* The Staff also offers limits on the amount of the PRMR that can be met through the auction for purposes of the Section 6w capacity obligations, beginning at 100% in planning year 2018/2019, and decreasing to 5.3% by planning year 2022/2023. The Staff expresses concerns about the rate-regulated utilities' market power in the short term, and the need to avoid overbuilding in the longer term in the event that load forecasts decrease. The Staff's phased-in proposal would eventually result in imposing a

minimum locational requirement on each electric provider of approximately 80% of capacity requirements sourced from within the zone.

The Staff describes the main advantage of this approach as being the contribution to reliability requirements. As for disadvantages, the Staff lists the significant additional burden on AESs, and "the eventual 80+% locational requirement could lead to up to an estimated 5% increase in planning reserves in Michigan that would be over and above the minimum reliability requirements at additional costs to Michigan customers." Report, p. 15.

The Staff then turns to a discussion on how to calculate the incremental capacity approach, which would begin with an annual review of each zone's ability to meet its LCR five years into the future. Based on retirements and other data, the Staff would determine any projected shortfall with respect to the LCR five years forward, which would be taken into consideration in the Staff's memo. The Staff proposes that the Commission could allow comments on the proposed shortfall before determining a final zonal LCR shortfall value annually, which would be shared by all electric providers in the zone on a pro rata basis and be applicable for the capacity demonstrations due in December and February.

The Staff proposes that the LCR for the initial capacity demonstration be zero. The LCR would remain at zero for the first four planning years, and then to-be-determined thereafter. The Staff opines that no incremental capacity would be required at least up to planning year 2021/2022, so the LCR would be 0.0% during that time, and becomes each electric provider's pro rata share of 1,000 megawatts (MW), increasing to 1,500 MW in planning year 2025/2026. Over time, "the locational requirement would eventually reach a full pro rata share of the LCR for all LSEs." Report, p. 16. The Staff states that the locational requirement under the incremental approach would likely be lower than it would be under the phased-in approach, and cites the

advantages of the former as requiring all electric providers to contribute towards new resources, and as benefiting ratepayers by ensuring that they do not bear any additional economic burden as a result of over-compliance and underutilization of imports. The Staff posits that rate-regulated utilities do not have a forward planning strategy that maximizes the capacity imports that are available to them, because they earn a return of and on local investments. Disadvantages of the incremental approach include the opportunity to game the system, and the lengthy time period until the full pro rata share of the requirement is imposed.

C. Capacity Demonstrations and the PJM Interconnection, LLC Footprint

The Staff notes that, unlike MISO, PJM has a mandatory forward capacity market for electric providers. The Staff recommends that the timing of PJM electric providers' capacity demonstrations be adjusted to allow them to file their demonstrations after the completion of PJM's Reliability Pricing Model Base Residual Auction (RPMBRA).

4. Comments on the Report

The MMG generally supports the areas of consensus described by the Staff. However, the MMG states that the Commission should recognize, with respect to the affidavit requirements, that circumstances change over time and contracts may be revised or terminated within a four year period, which makes it difficult to promise not to modify a contract. The MMG suggests inclusion of a provision prohibiting an electric provider from modifying or ending an existing contract without procuring a replacement resource. The MMG also questions whether copies of supply contracts should be required, because the Staff has the ability to request additional information at any time.

The MMG states that no locational requirement should be imposed until there is a projected shortfall, and that it supports the incremental approach. It adds that the Commission should

consider the higher risk imposed on utilities with highly concentrated loads made up of one or only a few customers, due to the unique load forecasting required. The MMG supports the recommendation to adjust the timing of the PJM electric providers' filings. Finally, the MMG points out that Section 6w(9) limits challenges to the demonstrations of municipally-owned utilities to the Attorney General or customers.

Consumers states that the Staff captured the areas of consensus, and that the company agrees with the Staff's proposed calculation of the LCR and description of the minimum acceptable support for various kinds of capacity resources. Consumers expresses concern over the timeline. In particular, with the Staff's memo filed in February, the show causes opened in March, and the final order coming in September, a utility that ends up with some amount of AES capacity load will not be able to use the auction in 2018 because it will not know how much choice load to cover. Consumers posits that the Staff's timeline does not align with the statute, or with the practical realities of planning. Consumers objects to a solution that would allow deficient AESs to purchase capacity for the 2018/2019 planning year through the auction, stating that this is simply the status quo and allows "AESs to be deficient if they believe they can gain an advantage by simply buying auction capacity for an additional year." Consumers' comments, p. 3. Consumers also states that it is unclear when the charge would begin, and argues that capacity should have to be provided at the commencement of the planning year.

Consumers contends that all providers' resource adequacy filings should be available for review by utilities and other interested parties subject to a protective order, and all retail electric providers should be treated similarly with respect to confidentiality.

Consumers expresses a preference for the phased-in locational requirement. Consumers argues that no provider should be considered to have demonstrated sufficient capacity if it only has

enough to meet 85% of its PRMR four years ahead. Consumers maintains that the 15% gap unreasonably risks grid reliability.[10]

In its reply comments, Consumers disagrees with Energy Michigan's assertion that there should be no limit on the ability of AESs to use the auction for demonstration purposes, because the auction provides no forward assurance that capacity will be available. In response to CNE, Consumers argues that all electric providers should be treated equally with respect to the ability to rely on the auction, and that 5% is an appropriate level for addressing changing circumstances. Consumers also posits that capacity needs to be tied to a specific resource. Finally, Consumers objects to confidentiality provisions that would preclude review of the information subject to a protective order.

MISO commends the Commission's proactive approach to the issues arising from Section 6w. MISO provides a description of its own requirements, and indicates its agreement with the Staff's proposed interpolation/extrapolation method. In its reply comments, MISO emphasizes that its resource adequacy processes are complementary to state reliability mechanisms.

GRACC comments that a locational requirement violates Act 341, noting that such a requirement was included in the Senate-passed version of the bill and was eventually replaced with compromise language allowing the use of any resource that MISO allows without reference to a locational requirement. If required, GRACC prefers the incremental approach.

[10] Consumers also asserts that it has, historically, built and acquired generation in order to serve bundled and choice load. Consumers' annual filings in the Commission's reliability investigations appear to contradict this assertion. *See, e.g.*, Consumers' Exhibit 3 in its responsive filings in Case Nos. U-18197 and U-17992. According to the Staff's assessment, Consumers appears to have begun subtracting choice load for capacity planning purposes at least as far back as 2006.

MCC expresses concern about the legality of a locational requirement, and opines that the Commission may be entering into matters of federal jurisdiction. If required, MCC prefers the incremental approach. In its reply, MCC indicates that it agrees with the comments of GRACC and Energy Michigan regarding the locational requirement.

ABATE supports the Staff's proposed resource demonstration guidelines, but suggests that the calculation of zonal LCR should include the subtraction of non-pseudo tied exports (which, ABATE argues, may appear in Zones 2 or 7 someday). ABATE suggests that the zonal capacity import limit be drawn from the most recent MISO LOLE study using interpolation/extrapolation as necessary to estimate the zonal capacity import limit values for the planning year in issue. ABATE also expresses the following concerns:

> ABATE also has concerns with respect to Staff's proposed requirement that new demand response or energy efficiency resources include in an affidavit "a commitment to achieve and/or maintain at least the same level of resources four years forward." (Staff R&R at 8.) First, Staff has not applied this requirement to new or upgraded generation. (Id. at 7.) Second, the requirement makes no sense since there is nothing to maintain at the same level since the new demand response or energy efficiency is not currently being provided and will only be provided for the first time beginning four years forward. For these reasons, we recommend the Commission delete the words "including a commitment to achieve and/or maintain at least the same level of resources four years forward" from the affidavit requirement for new demand response or energy efficiency resources.

ABATE's comments, p. 4. ABATE agrees that the annual calculation of the PRMR and LCR should be subject to comment, and suggests the comments be supported by an affidavit. ABATE opposes the locational requirement, but prefers the incremental approach if required.

DTE Electric comments that the LCR proposals put forward by the Staff are inadequate. It also expresses concern that the proposed timeline will leave utilities with insufficient time to plan, stating "utilities should not be subject to penalties associated with insufficient capacity procurement in the initial years." DTE Electric's comments, p. 4 (note omitted). The company

states that the Commission should issue a final order in a show cause by May 23, 2018, authorizing the relevant utility to bill AES customers the appropriate charge beginning June 1, 2018; or, alternatively, authorize some charge that would be subject to a refund. DTE Electric comments that, for new generation resources, an officer affidavit alone is not sufficient for demonstration purposes, and additional evidence such as a permit application should be supplied. In its reply comments, DTE Electric indicates its agreement with the Staff that a plan to purchase ZRCs in the auction does not constitute a sufficient demonstration, and asserts that it is critical that demonstrations are backed by specific, physical units intended as resources, because MISO's resource adequacy construct does not ensure adequacy in states with retail competition.

Energy Michigan comments that neither federal nor state law authorize the Commission to "exceed its state or wholesale jurisdictional authority in setting either a LCR or a locational requirement applicable to individual electric providers," and states that Section 6w(6) prohibits the Commission from imposing a load-ratio share requirement of the LCR on AESs. Energy Michigan's comments, p. 3. Energy Michigan notes that a locational requirement was contained in earlier drafts of Senate Bill 437 but was later removed, signaling the legislative intent. Energy Michigan claims that any restriction on an AES's use of the MISO market to meet capacity obligations violates federal law, and that no such power has been delegated by FERC or MISO to the Commission.

Energy Michigan supports the Staff's proposal to use a format similar to the traditional annual investigations, but disagrees that it should cover five years, suggesting four years instead. Energy Michigan also objects to any requirement that forward ZRC contracts must specify the zonal locations of the ZRCs, and to any restriction on the use of the auction by AESs, noting that utilities have stated that they intend to use the auction for short-term purchases. If a locational requirement

is set, Energy Michigan prefers the incremental approach. In its reply comments, Energy Michigan indicates that it agrees with the comments of ABATE, MMG, and CNE regarding the affidavit supporting demand response and other resources, and supports the Staff's recommendation to continue the confidentiality measures in use with the current reporting forms. Energy Michigan indicates that it agrees with Wolverine that electric providers (and not customers) are responsible for capacity demonstrations and SRM payments, and customers should not pay a direct SRM charge.

Wolverine generally supports the Staff's proposals, but opposes any locational requirement, and any charge being placed directly on choice customers. Wolverine comments that a locational requirement will result in applying a charge when excess capacity exists. Wolverine encourages the Commission to establish the ability to use inter-peninsula transmission.

Representative Gary Glenn, 98th District, Michigan House of Representatives, comments that the Commission has no legal authority to impose a locational requirement under Act 341, and points to the comments filed by the Staff on May 26, 2017, in this docket opposing a locational requirement. Rep. Glenn posits that the requirement conflicts with the federally approved tariff of the regional electric grid operator and will cost Michigan schools and businesses hundreds of millions of dollars. Rep. Glenn states that a locational requirement will potentially end the choice program and re-monopolize Michigan electricity to the benefit of the incumbent utilities.

CNE supports the Staff's proposed timeline and most of the guidelines for the resource demonstrations, as well as the contested case process. CNE agrees with the five year requirement and the use of the existing forms. CNE proposes that the Commission use the data to determine a self-supply threshold for each AES for the applicable year, and proposes that electric providers be

allowed to plan to procure greater than 5% of their planned resources from the auction. CNE asserts that this will accommodate load changes that occur.

CNE suggests that, with respect to demand response (DR), the Commission recognizes that it is unlikely that customers will be willing to make a contractual DR commitment four years in advance, making it difficult for a corporate officer to sign an affidavit to that effect. CNE recommends that electric providers be allowed to update their capacity demonstrations annually to add DR resources, which is consistent with current contracting customs. CNE also suggests that the Commission recognize wholesale contracting customs in MISO with respect to forward contracts for delivery of ZRCs, which may not identify a specific resource. CNE comments that electric providers should be permitted to plan to meet up to 10% of their capacity demonstrations using ZRCs secured in the auction. CNE supports the Staff's recommendation that information continue to be submitted confidentially, under seal.

CNE opposes any locational requirement, arguing that "If Act 341 imposes a local resource requirement, then the law may be determined to conflict with federal wholesale power regulations providing suppliers with the ability to participate in the auction and acquire any ZRCs. It also could be viewed to unfairly erect a barrier to out-of-state resource participation in violation of the dormant Interstate Commerce Clause." CNE's comments, p. 14. If required, CNE prefers the incremental approach. In its reply comments, CNE emphasizes that electric providers should be allowed to update their demonstrations on an annual basis to reflect new DR resources, and urges the Commission to retain the confidentiality measures in place for past reliability investigations.

In its comments, USSC argues that a locational requirement would unnecessarily limit the amount of capacity that could be imported into Michigan, and would force choice customers to pay the utility's embedded capacity costs.

5. The Commission's Determination of Process and Capacity Obligations Under Section 6w

A. The Planning Reserve Margin Requirement

As discussed above, each year, MISO establishes the PRMR. Through its stakeholder process, MISO determines the appropriate planning reserve margin for the applicable planning year based on a probabilistic analysis of the MISO region's ability to reliably serve its coincident peak demand for that planning year. The planning reserve margin is calculated to meet the reliability standard for the region. Applying the incremental planning reserve margin to the coincident peak demand for a particular electric provider yields its PRMR, or the total amount of capacity resources that are required to reliably serve the provider's projected peak demand.

Under Section 6w, the Commission is required to establish a forward planning reserve margin requirement. MCL 460.6w(8)(c) requires the Commission to request technical assistance from the ISO in determining the PRMR applied under Section 6w, and, where necessary, set the PRMR, consistent with federal requirements, to be applied under Section 6w. MCL 460.6w(12)(e) defines PRMR for purposes of Section 6w as the amount "as set by the commission or the appropriate [ISO] under subsection (8)."[11] Technical assistance from MISO has already been requested and rendered. The Commission accepts the PRMR as set by MISO for the prompt year, but must set its own for the three additional planning years addressed by Section 6w, because MISO does not. This approach is the fundamental improvement to reliability resulting from Section 6w and is consistent with the federal requirements.

[11] The Commission notes that there is language in MISO Module E-1 (Sections 68A and 69A of the MISO Tariff) that addresses the ability of a state regulatory body to establish a PRMR different from MISO's. The Commission finds that Section 6w is not referring to this language, and that the PRMR set by MISO for each prompt year is the PRMR that applies in Michigan.

The Commission adopts the Staff's proposed calculation of the PRMR, which appears on p. 2 of Attachment A. This calculation method comports with MISO processes, and does not appear to have been the subject of much contention in the conferences or comments. By December 15, 2017, each electric distribution company must provide to MISO the peak load contribution for each AES in its service territory, which reflects each AES's share of responsibility for serving load on MISO's peak day. By January 15, 2018, each AES must have reviewed its peak load contribution and must notify MISO if revisions are necessary, or confirm to MISO that it is responsible for its assigned load. At that point, each AES's capacity responsibility under MISO's construct will be set for the planning year that begins on June 1, 2018, and the Commission will adopt MISO's determinations. Thus, the Staff's calculation relies on the aggregate peak load contribution of the relevant electric provider in 2018.

For planning years 2019-2021, the electric provider's capacity obligation shall be equal to its 2018 peak demand plus the planning reserve margin projection for the applicable year, as specified by MISO in its LOLE Study Report for the applicable year, or as interpolated and tabulated in Attachment A. The Commission understands that there is significant complexity and uncertainty surrounding the determination of peak load contribution for electric providers, and that electric providers have until January 15 to dispute their assignment with MISO. That said, the Commission will ultimately adopt the peak load contributions as determined on January 15 in the existing MISO process.

Due to fluctuations in customer demand and availability of resources that may occur over the four-year period, the Commission is also allowing electric providers to plan on up to 5% of their portfolio to be acquired through MISO's annual capacity auction. Based on MISO data, this is consistent with the historical use of the MISO auction in Michigan at the aggregate level (some

individual providers may use the auction more or less).[12] Any excess or deficiency in supplies in real time can be bought or sold in this annual auction as well, just as it is done today. As such, the Commission has determined that the capacity demonstrations made by the electric providers in this matter will be subject to the following requirements for owned or contracted resources sourced outside of the auction:

Planning Year	2018/ 19	2019/ 20	2020/ 21	2021/ 22	2022/ 23	2023/ 24	2024/ 25	2025/ 26	2026/ 27
Non-auction Purchases (%)	NA	95%	95%	95%	TBD	TBD	TBD	TBD	TBD

The first planning year is a transitional year, and the Commission finds that electric providers will need the maximum amount of flexibility in light of the compressed timeline that Section 6w presents and the direct overlap with the MISO requirements; thus, electric providers can use the auction for 100% of the demonstration if necessary. Defaulting to the MISO requirements in the first year is also the best way to ensure consistency with the MISO tariff.

After the first planning year, the nature of the locational requirement will have been determined in a separate proceeding (discussed below), and the Commission and electric providers will have one year of experience under their belts. The Commission rejects commenters' proposal to allow more than 5% of auction-based resources in the out years, because anything more than 5% could create a situation where the determination comes too late for the affected utility to plan to meet the incremental capacity obligation. The Commission will evaluate, as part of a contested case process, the percentage of non-auction purchases applicable for planning years 2022 and beyond in order to make refinements if needed based on the impact of energy waste reduction initiatives or other considerations.

[12] https://www.misoenergy.org/Library/Pages/ManagedFileSet.aspx?SetId=2054

It is essential to note that the Commission is in no way restricting access to the auction. Electric providers are neither relieved from nor restricted from fully participating in the MISO auction. The Commission also recognizes the risk that the overall capacity position of a particular electric provider may change (either through load variability, or the UCAP capacity rating of generation resources, or other unforeseen circumstances) between the time that they make their capacity demonstration and the time in which the load and resources are cleared in the MISO auction. The Commission supports the continued use of the MISO auction as a clearing mechanism, in which any variation in load requirements, generator capacity ratings, or other unforeseen circumstances can be rectified. Subsequent to an electric provider making a capacity demonstration that satisfies all requirements put forth by the Commission, any and all variation realized in an interim year may be handled through ZRC purchases or sales in the auction.

Once the Commission has determined that the capacity demonstration made by an electric provider is sufficient, it shall not be re-litigated or "trued-up" in the interim years. If, subsequent to its initial satisfactory capacity demonstration, an electric provider experiences an unforeseen significant outage at one of its generation assets, or has an unforeseen variation in its total load obligations, these matters will be settled in the auction without penalty. The Commission finds that an electric provider's initial capacity demonstration will not be re-examined to reconcile projected interim year load obligations or generating resource capacity ratings with actual values that are experienced in that interim year. The Commission recognizes that all of these determinations depend on projections, and finds that giving finality to the process will benefit all parties by creating certainty that demonstrations will not be subject to retroactive reviews.

B. The Legal Underpinnings of the Forward Locational Requirement

By far the most contentious issue, in both the development of Section 6w through the legislative process and during the collaborative proceeding to establish a capacity demonstration process, has to do with establishment of a forward locational requirement for generation resources used to meet capacity obligations to enhance reliability in Michigan.

As discussed above, MISO establishes a locational requirement each year, known as the LCR, which recognizes the necessity for a certain amount of the capacity resources needed to meet PRMR to be located within a specific geographic area. The LCR can be expressed as a percentage of the overall PRMR. In the Lower Peninsula (MISO Zone 7), for the 2017/18 planning year, the LCR is 94.7% of PRMR. This means that 94.7% of the capacity resources that Zone 7 needs to be able to reliably serve electric customers have to come from within Zone 7. This is relatively high compared to other zones in the MISO footprint, as shown:

Local Resource Zone	Z1	Z2	Z3	Z4	Z5	Z6	Z7	Z8	Z9	Z10
PRMR	18,316	13,366	9,781	9,894	8,598	18,422	22,295	8,329	20,850	4,902
LCR	15,975	11,980	7,968	5,839	5,885	13,005	21,109	6,766	17,295	4,831
LCR/PRMR (%)	87.2%	89.6%	81.5%	59.0%	68.4%	70.6%	94.7%	81.2%	82.9%	98.6%

Zone 7's LCR is higher than other areas in MISO due to a number of factors, including the age and reliability of resources within the zone, the geographic nature of the zone (a peninsular state with limited interconnection), and the amount of available transmission import capacity. It is important for the Commission to be cognizant of these factors when setting capacity obligations under Section 6w, both to ensure that its decisions do not hinder the reliability of Michigan's electric grid, as well as to take into consideration the potential financial consequences associated with not meeting the MISO LCR. As envisioned by Section 6w, it is also important to ensure the state's capacity obligations are consistent with and complementary to MISO's tariff to avoid or minimize any impact on MISO's auction process.

Under Section 6w, the Commission is required to establish a forward local clearing (locational) requirement. MCL 460.6w(8)(c) requires the Commission to request technical assistance from the ISO in determining the LCR applied under Section 6w, and, where necessary, set the LCR, consistent with federal requirements, to be applied under Section 6w. MCL 460.6w(12)(d) defines LCR for purposes of Section 6w as the amount as determined by the appropriate ISO "and by the commission under subsection (8)." As stated, technical assistance from MISO has already been requested and rendered.

Several commenters have argued that Section 6w does not give the Commission authority to establish a forward locational requirement. As the Commission found in its June 15 order, pp. 10-11:

> As defined in Section 6w(12)(d), "local clearing requirement" means "the amount of capacity resources required to be in the local resource zone in which the electric provider's demand is served to ensure reliability in that zone as determined by the appropriate independent system operator for the local resource zone in which the electric provider's demand is served and by the commission under subsection (8)." As noted above, in requesting assistance from MISO in determining capacity obligations, the Commission is tasked with requesting technical assistance in determining this local clearing requirement.
>
> Section 6w(8) also requires individual electric providers to demonstrate to the Commission that they can meet capacity obligations. The Commission is directed to require each electric provider to demonstrate that it "owns or has contractual rights to sufficient capacity to meet its capacity obligations as set by the appropriate independent system operator, or commission, as applicable" four years into the future. These capacity obligations necessarily include a local clearing requirement.
>
> It is clear that the statute requires the Commission to create capacity obligations, that these capacity obligations include a locational requirement, and that the Commission, in setting locational capacity obligations, is allowed to require a demonstration by individual electric providers that the resources that they use to meet their capacity obligations meet a local clearing requirement. The Commission acknowledges the inter-relatedness of the MISO and Section 6w capacity demonstration processes, but also points out that these are distinct activities. These activities should be harmonized to the extent practicable, but the

> fundamental responsibility of the Commission is to meet Michigan's statutory obligations.
>
> Thus, the Commission finds that a locational requirement is required under Section 6w and that a locational requirement applicable to individual LSEs is allowed as part of the capacity obligations set forth by the Commission pursuant to Section 6w in order to ensure all providers contribute to long-term resource adequacy in the state.

GRACC and Energy Michigan point to previous versions of the legislation. The Commission acknowledges that previous versions of the legislation included a detailed methodology relative to determining the share of a forward locational requirement each provider would have to demonstrate. What changed from the version passed by the Senate to the one ultimately enacted into law is not that a locational requirement went away entirely, but that an explicit methodology was removed and replaced with provisions that leave decisions on the methodology of how to establish the locational requirement up to the Commission. Rather than a prescriptive requirement that, say, each electric provider is required to demonstrate 50% of their proportional share of an overall LCR, the statute gives the Commission flexibility to determine how best to establish a forward locational requirement and the resources that qualify to meet that requirement.

Several commenters also rely on Section 6w(6) to argue that a forward locational requirement is not authorized under the statute because providers are allowed to meet capacity obligations "through owned or contractual rights to any resource that the appropriate independent system operator allows to meet the capacity obligation of the electric provider," which "shall not be applied in any way that conflicts with a federal resource adequacy tariff, when applicable." As described above, MISO annually sets both a PRMR and an LCR. Resources used to meet the PRMR may be sourced from anywhere within MISO. Resources used to meet the LCR must come from within the zone in question. This means that in order to determine what resources count to meet MISO capacity obligations, it must be determined which MISO capacity obligation is being

referred to – when it is MISO's LCR, then resources sourced from anywhere within MISO will not necessarily count. The statutory language is important, because there are resources that are not physically located in the Zone but count toward that Zone's LCR under current MISO rules. Ensuring consistency between the Section 6w obligations and MISO rules on details such as this was an important consideration in the legislation; these provisions as well as Section 6w's requirement for the Commission to seek technical assistance from the independent system operator in setting the PRMR and LCR and "assessing resources to ensure that any resources will meet federal reliability requirements" reinforce how the legislation sought to align the federal and state resource adequacy mechanisms.

Commenters also argued that the locational requirement should not be applied to individual electric providers because the statute does not allow it, and the LCR in MISO applies to the Zone as a whole through the auction. The Commission disagrees. First, any entity that FRAPs under MISO's process must demonstrate they have sufficient resources that are physically located in the local zone (or otherwise count toward the LCR) to meet their proportional share of the LCR. MISO's FRAP process is akin to what is envisioned with the Section 6w capacity demonstration process. Second, the Commission notes additional language in Section 6w that supports the conclusion that a locational requirement should be applied to an individual electric provider. Section 6w(8)(b) provides that:

> One or more municipally owned electric utilities may aggregate their capacity resources that are located in the same local resource zone to meet the requirements of this subdivision. One or more cooperative electric utilities may aggregate their capacity resources that are located in the same local resource zone to meet the requirements of this subdivision. A cooperative or municipally owned electric utility may meet the requirements of this subdivision through any resource, including a resource acquired through a capacity forward auction, that the appropriate independent system operator allows to qualify for meeting the local clearing requirement.

This provision allowing municipally-owned and cooperative electric utilities to aggregate their resources in order the meet the requirements of Section 6w(8) clearly implies that these utilities would otherwise be required to meet the requirements on an individual basis. The Commission finds that it would be unreasonable to interpret the statute such that this obligation for individual compliance "for meeting the local clearing requirement" is placed solely on municipally-owned and cooperative utilities under Section 6w. The Commission can find nothing in the law, and no rational basis, to indicate an intent to place a local clearing requirement only on non-profit utilities. Instead, the law is more logically understood to require that all individual utilities be treated similarly in terms of requirements, and that the aggregation option was intended to assist non-profit utilities (many of which are small) to comply more easily. Thus, this language further supports the Commission's interpretation that a locational requirement is authorized and may be applied to individual electric providers. It is worth emphasizing that this does not mean the Commission accepts the regulated utilities' positions on this matter. Indeed, the Commission reinforces a point made in its June 15 order that allocating a proportional share may not be equitable or reasonable, could lead to excess procurement, and would put incumbent utilities at a distinct advantage.

Many commenters also argue that if the Commission establishes a forward locational requirement, this will conflict with MISO's FERC-approved tariff. The Commission reiterates that MISO establishes capacity obligations for the upcoming planning year, while Section 6w requires that providers demonstrate they can meet their capacity obligations four years into the future. By setting a forward capacity obligation, the Commission does not replace or supplant the MISO prompt year capacity obligation. Rather, the Commission, pursuant to Section 6w, is attempting to ensure that the needs of all electric customers in the state are being planned for in

advance. The Commission views the forward capacity obligations it sets under Section 6w, and the demonstrations that will be made by providers, as being distinct from but complementary to MISO's resource adequacy construct, and as providing visibility into the state's projected resource adequacy farther into the future than existing processes allow. Suppliers will still be required to meet capacity obligations established by MISO once the planning year in question arrives.

Even MISO acknowledges this in its reply comments, p. 1, stating:

> MISO's resource adequacy processes do not preclude the Michigan PSC from requiring LSEs to make a forward showing of its ZRCs. Because of the prevalence of bilateral contracting and cost-of-service regulation within MISO's footprint, it is not uncommon for LSEs to procure ZRCs well in advance of the relevant Planning Year. MISO's Resource Adequacy Requirements do not in any way affect state actions over entities subject to a state's jurisdiction. Rather, MISO's resource adequacy processes are complementary to the reliability mechanisms of the states.

As MISO's comments reflect, FERC does not claim exclusive jurisdiction in the field of resource adequacy. Rather, FERC is required to ensure that all rates and charges in connection with the wholesale sale or transmission of electric energy are just and reasonable. 16 USC 824(b)(1); 16 USC 824d(a); 16 USC 824e(a). FERC has repeatedly confirmed that both FERC and the states have jurisdiction over resource adequacy, stating "We will defer to state and local entities' decisions when possible on resource adequacy matters," and that "as a general matter, a state or region may determine in the first instance the appropriate level of planning reserves by balancing reliability and cost considerations." *California Independent System Operator Corp (CAISO)*, 119 FERC ¶ 61,076 at P 540, p. 212 (2007); *ISO New England, Inc.*, 121 FERC ¶ 61,125 at P 47, p. 13 (2007) (citation omitted); *see also, CAISO*, 116 FERC ¶ 61,274 at P 1112, p. 305 (2006). Clearly, the LCR is a central part of MISO's tariff and FERC's approval of that tariff. The Commission, in designing any forward locational requirement, would seek to ensure that the energy providers in the state can meet the LCR over the long term in a cost-effective manner and avoid impacting the

federal resource adequacy provisions or wholesale markets. The Commission has the discretion under Section 6w to establish a forward locational requirement, and doing so is not inconsistent with – indeed, is complementary to – the MISO tariff.

C. The LCR and Future Contested Case

Notwithstanding the preceding discussion, the Commission is concerned that the collaborative process utilized in this proceeding did not result in information regarding either the phase-in approach or incremental approach sufficient to allow the Commission to make a decision on a forward locational requirement at this time. The Commission believes that a full record, which more deeply explores issues related to establishment of a forward locational requirement and which is developed through a contested case process, is necessary to establish an appropriate allocation of the forward locational requirement. Thus, the Commission declines to set an individual allocation of the forward locational requirement for the 2018/19 through 2021/22 planning years. Instead, the Commission is adopting the calculation methodology to set the zonal forward locational requirement, as proposed by the Staff, discussed in the technical conferences, and clarified in MISO's August 15 comments, for the 2018/2019 through 2021/2022 planning years. The Commission intends to open a new docket for the purpose of making a determination on the methodology to set a forward locational requirement for the 2022/2023 planning year and subsequent planning years, and to examine the methodology for determining the PRMR starting with the 2022/2023 planning year as well. The reasons for this are several.

In the near term, reliability remains a concern; but the Staff observed in its June 27 memo in this docket that it is expected that MISO has adequate capacity over the next five planning years. The Commission is well aware how these projections can change abruptly and significantly based on load forecasts and generator availability. Despite this uncertainty, the current supply outlook,

combined with the other aspects of the capacity demonstration requirements set forth in this order, will ensure that all electric providers are taking proactive steps to secure available capacity or invest in new capacity over the next four years. This is a marked improvement over the status quo, which relied on "just in time" capacity through the MISO annual auction. The Staff and others, in comments posted in this docket, have also stressed the potential financial risk associated with a local resource zone not meeting MISO's LCR, so there are still financial incentives in place to source capacity locally.

Further, utilities have built out their electric generation systems over decades and have sourced nearly all of their generation resources locally, while any forward locational requirement that is instituted will be applicable to AESs for the first time. It has been noted by some commenters that, depending on how a locational requirement is structured, there may not be adequate capacity in Zone 7 for AESs to meet such a requirement in the upcoming planning year. Providing adequate time to implement a new locational requirement is an acknowledgement of this reality.

There have been arguments made that costs are shifted to full service utility customers that otherwise would have been borne by AES customers – that is, if AES customers were actually utility customers, and were helping to offset utility embedded costs, then rates for full-service customers would be lower. The Commission is not persuaded that this is the case – both Consumers and DTE Electric have indicated in their filings in this docket and elsewhere that while they have adequate resources to serve their projected full-service load, they are expressly not planning to serve potential choice load. Further, both have argued that they would likely have to procure capacity resources from MISO's auction to serve choice load under the SRM until new resources could be acquired or built over a longer term.

Ultimately, the Commission wants to ensure that the electric grid is reliable and that resource adequacy needs are being met. Given the realities of Michigan's retail market structure and the interplay with MISO's resource adequacy construct, as well as the potential impact any new locational requirement may have on customer costs, it is important for the Commission to ensure that appropriate standards are developed through a fair and open process.

Thus, allowing for more time before a forward locational requirement is implemented, and making decisions about how the requirement is determined through a more formal proceeding, is justified. In a new docket which will be opened in the near future, the Commission will seek additional information to establish the methodology and mechanics for determining an allocation of the forward locational requirement. For example, in potentially looking at an incremental requirement, the time period covered (starting and ending dates), load forecasts, how to determine what plant retirements to factor into the projected need, and what capacity additions should be considered, would all need to be determined. Allocations among providers would also be an issue with any methodology. In examining an approach where shares of a forward requirement would be allocated among providers, determination of projected future needs, how allocations should take place, and in what amounts, would all be crucial. These are just some of the issues that will need to be considered in the upcoming case, and the Commission looks forward to robust participation from interested parties.

D. The Capacity Demonstration Process

Turning to the demonstration requirements, the Commission appreciates the hard work of the stakeholders and especially the Staff to reach the significant amount of consensus that was achieved in the technical conferences. Today, the Commission adopts much of the content of the

Staff's Report, with some minor revisions, as reflected in Attachment A to this order, the Capacity Demonstration Process and Requirements.

i. Timeline for Filings and the Staff's Determinations

The Commission finds that the suggested timeline was supported by the stakeholders, but agrees with commenters that the demonstrations should cover four years rather than five, because Section 6w focuses on the initial four year period. The Commission acknowledges that, in the first year, if any show cause proceedings are commenced and result in the imposition of an SRM charge beginning on or near September 1, 2018, the utility covering that load would not have been able to rely on the auction from the prior spring, and will see the charge commence approximately three months later than the earliest possible date allowed under the statute, but cannot see any other way to carry out the duties placed upon the Commission in a prudent and thoughtful manner, and in compliance with due process requirements.

The show cause proceedings are subject to the typical standards for intervention, and the Administrative Law Judge will be in charge of the schedule for each proceeding, subject to the need to accommodate a final order no later than September 1 of each year. The AES that is the subject of the show cause proceeding would still have its obligation under the MISO tariff to participate in the auction on behalf of its load, because its capacity obligations would not have been transferred to the incumbent utility at that point in time. Any SRM charges authorized by the Commission on or after September 1 may be adjusted to reflect the amount of auction purchases made by the AES on behalf of the load in question based on record evidence presented in the case.

In today's order in Case No. U-18441, the Commission opens the docket that will be the repository for all of the electric providers' filings for the initial demonstrations. In that order, the Commission finds that the regulated electric utilities and AESs shall file demonstrations for the

first four planning years, and the cooperatives and municipally-owned utilities shall file demonstrations for the planning year four years out (but requests that they provide demonstrations for the full four years, as discussed below). The Commission has adjusted the timeline slightly to require that the Staff file the memo in that docket indicating its determination on each electric provider's demonstration by March 6, 2018. The Staff is directed to prepare and file in the docket a table that identifies the capacity by type for each individual electric provider. To avoid revealing the identity of individual electric providers, the capacity can be stated in percentages with the electric providers identified by number instead of name (e.g., electric provider 1's capacity is 50% from owned resources, 25% under PPA, and 25% new DR).

The extent of the information required by the Commission underlies the decision to give the Staff additional time. However, the Commission recommends that, where it is quickly obvious to the Staff that a show cause order is warranted, the Staff could so indicate in the docket prior to March 6, 2018, so that those proceedings may be commenced as soon as possible and before the full analysis is due. Pursuant to Section 6w(8)(d), the Staff is required to work with MISO to determine whether specific resources put forward by an electric provider meet federal reliability requirements, and the Staff's determinations will be supported by that requirement for federal-state cooperation.

ii. Resource Demonstrations

The Commission adopts the guidelines for resource demonstrations as reflected in Attachment A. These are largely identical to those contained in the Report, except to add that commitments of resources must apply to load in the applicable Michigan Zone. The Commission finds that copies of supply contracts are essential because the Staff cannot be put in the position of needing to request more documentation – the timeline simply does not allow for that. The

Commission approves the proposal to grandfather the 20+ year municipal contracts. The Commission has considered the comments, and is not persuaded that the language of the affidavits requires revision. The Commission understands that the affidavits represent a snapshot in time – reflecting the resource circumstances as known to the company officer at the time that the affidavit is signed – and that the situation may change. The demonstrations are annual and, if resource applicability has changed during the preceding year, then the demonstration information should be updated, even if the electric provider will continue to satisfy its capacity requirements.

iii. Confidentiality

The Commission is not persuaded that all electric provider filings should be made available to all stakeholders subject to a protective order. The regulated utilities have failed to provide a convincing reason to deviate from the treatment these filings have received in the annual reliability investigations. *See,* the May 11, 2017 order in this docket, item no. 51. The Commission adopts the confidentiality provisions pertaining to the proceeding initiated by the January 12, 2017 order in this docket. All electric providers will be treated identically with respect to confidentiality. Thus, electric providers may request assistance from the Executive Secretary in making confidential filings of commercially sensitive information in the docket in Case No. U-18441. Confidential filings may be viewed by the Staff, but may not be viewed by other electric providers. If a show cause is commenced, any party may seek intervention in that matter, and questions regarding discovery will be handled in the first instance by the Administrative Law Judge.

iv. Providers in the PJM Footprint

Finally, the Commission disagrees with the Staff's recommendations respecting the timing of capacity demonstrations for electric providers in the PJM footprint. PJM has a mandatory three-

year forward capacity market for electric providers.[13] While the Commission does not have enforcement authority over cooperative and municipally-owned electric utilities, Section 6w(11) leaves it to the Commission's discretion to determine a generation capacity charge under PJM's reliability assurance agreement. MCL 460.6w(8)(b)(ii), 460.6w(11). The Commission has not opened any SRM charge proceedings for electric providers in PJM's footprint. However, the Commission finds that electric providers in the PJM footprint should file capacity demonstration plans on the same date as other providers, that is, December 1 for regulated utilities and February 9 for cooperatives and municipally-owned utilities. The RPMBRA is in May, and the Commission finds that providers should indicate in their demonstrations whether they intend to participate in that auction or not. If an electric provider participates in the RPMBRA, it should file an amended capacity demonstration two weeks after the close of the RPMBRA.

6. Summary of Findings and Conclusions

Section 6w of PA 341 was enacted to enhance the reliability of Michigan's electric grid, specifically by requiring all electric providers to secure sufficient supplies of electric capacity to serve their anticipated customer needs four years in advance. Through this order, the Commission is establishing the requirements and process for each electric provider to make such demonstrations to the Commission.

The Commission is providing flexibility for electricity providers to use a broad range of options to meet the requirements such as new or existing generation, purchased power contracts, and new or existing energy waste reduction or demand response programs consistent with the applicable independent system operator's tariff. Capacity supplies can be sourced from out of state

[13] In the September 25, 2012 order in Case No. U-17032, the Commission approved a state compensation mechanism for AES capacity in I&M's Michigan service territory. I&M currently has no choice load.

but the electric provider must own or have contractual rights to the supply. This will improve reliability because capacity at the state and regional level will actually be secured in advance, whether that is taking advantage of excess supply that exists today or investing in new resources. This approach is also cost effective because the electric provider is in the best position to pursue the lowest-cost options to meet its customers' needs in a reliable manner and to manage the risk of importing capacity supplies from out of state. Unlike approaches in some states that provide incentives or subsidies to specific types of generation in an attempt to protect reliability or meet other policy objectives, Michigan's approach is "fuel neutral." That is, electric providers know their capacity requirement four years into the future through this order and the provider – not the state – determines what fuel or combination of fuels to use, potentially taking into account factors such as reliability, fuel diversity, plant performance, cost, environmental impact, and risk.

Due to fluctuations in customer demand and availability of resources that may occur over the four-year period, the Commission is also allowing electric providers to plan on up to 5% of the portfolio to be acquired through MISO's annual capacity auction. Based on MISO data, this is consistent with the historical use of the auction in Michigan at the aggregate level.

While the Commission has the authority under Section 6w to apply a local clearing requirement to individual electric providers, it does not impose such a requirement for planning years 2018-2021. The Commission instead seeks additional information through a formal hearing process in order to determine the proper methodology and allocation of a locational requirement, which would apply in 2022.

The Commission recognizes that ensuring resource adequacy entails involvement of both state and federal regulators, and is implementing the provisions of Section 6w with an eye towards maintaining consistency with federal resource adequacy requirements as reflected in the FERC-

approved MISO tariff. In setting capacity obligations and establishing a capacity demonstration process pursuant to Section 6w, the Commission does not seek to supplant or replace the MISO prompt year capacity obligations, but to complement MISO's resource adequacy construct by providing longer-term visibility into the resource adequacy planning efforts of electric providers in the state. Further, the Commission recognizes that efforts to ensure resource adequacy have impacts on both full-service and electric choice customers, and intends to continue to work toward maintaining reliability of the electric grid in a consistent and cost-effective manner.

Key findings and conclusions are as follows:

1. Each load serving entity in the state must show it owns or has contractual rights to sufficient capacity to meet capacity obligations set by MISO or the Commission, as applicable, as set forth in the order and the requirements in Attachment A of this order, under the timelines established in Section 6w for the respective type of load serving entity. Electric cooperatives and municipally-owned utilities may aggregate capacity resources to meet the capacity requirements pursuant to Section 6w(8)(b).

2. The Commission adopts the review process for evaluating each individual load serving entity's capacity demonstration filings as outlined by the Staff, discussed in this order, and set out in Attachment A. Show cause proceedings shall be initiated if an individual load serving entity does not appear to have sufficient capacity based on the Staff's assessment. Such a proceeding will provide an opportunity for parties to present evidence on whether the electric provider has failed to demonstrate it can meet a portion or all of its capacity obligations, thereby triggering Commission action as set forth in Section 6w(8)(b)(i)-(iii).

3. Pursuant to Section 6w(8)(c), the Commission requested and received technical assistance from MISO, the appropriate independent system operator, in determining the PRMR and LCR for

purposes of determining capacity obligations. For purposes of the capacity obligations, in establishing the PRMR for planning years 2018-2021 the Commission adopts the calculation methodology outlined in Attachment A, which utilizes the MISO PRMR data published in the MISO Loss of Load Expectation Study, pursuant to Module E of its FERC-approved tariff. For planning years 2018-2021, the Commission is adopting the proposed calculation methodology to set the forward locational requirement of each Zone, as proposed by the Staff, discussed in the technical conferences, and clarified in MISO's August 15 comments.

4. Based on Section 6w, the MISO tariff, and applicable case law, a properly designed locational requirement applied to individual load serving entities as part of a demonstration that capacity obligations have been met is consistent with these requirements. Except as applicable under MISO's tariff, a locational requirement will not be applied to individual load serving entities during planning years 2018-2021 as part of the transition to the new capacity obligations required under Section 6w. A formal contested case proceeding is necessary to provide an opportunity for parties to present and challenge evidence in order for the Commission to determine a just and reasonable locational requirement and methodology that is consistent with federally approved tariffs, which will be applied beginning in the 2022 planning year.

5. The Commission's determination of capacity obligations under Section 6w does not relieve or restrict a load serving entity's rights and responsibilities under the FERC-approved tariffs, including access to and participation in the capacity auction.

6. Pursuant to Section 6w(8)(d), the Commission requests continued technical assistance from MISO, the applicable independent system operator, to assist with determining whether resources meet federal reliability requirements as part of the Section 6w capacity demonstration review process. The Staff shall coordinate with MISO accordingly.

7. Electric providers in the PJM footprint should file capacity demonstration plans on the same date as other electric providers, that is, December 1, 2017, for regulated utilities and February 9, 2018, for cooperatives and municipally-owned utilities, and should indicate in their demonstrations whether they intend to participate in PJM's auction or not. If an electric provider participates in the auction, it should file an amended capacity demonstration two weeks after the close of the RPMBRA.

THEREFORE, IT IS ORDERED that:

A. The Capacity Demonstration Process and Requirements, attached hereto as Attachment A, are approved.

B. Capacity demonstrations shall be filed in Case No. U-18441, in accordance with Attachment A.

C. This docket is closed.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26. To comply with the Michigan Rules of Court's requirement to notify the Commission of an appeal, appellants shall send required notices to both the Commission's Executive Secretary and to the Commission's Legal Counsel. Electronic notifications should be sent to the Executive Secretary at mpscedockets@michigan.gov and to the Michigan Department of the Attorney General - Public Service Division at pungp1@michigan.gov. In lieu of electronic submissions, paper copies of such notifications may be sent to the Executive Secretary and the Attorney General - Public Service Division at 7109 W. Saginaw Hwy., Lansing, MI 48917.

MICHIGAN PUBLIC SERVICE COMMISSION

_____

Sally A. Talberg, Chairman

_____

Norman J. Saari, Commissioner

_____

Rachael A. Eubanks, Commissioner

By its action of September 15, 2017.

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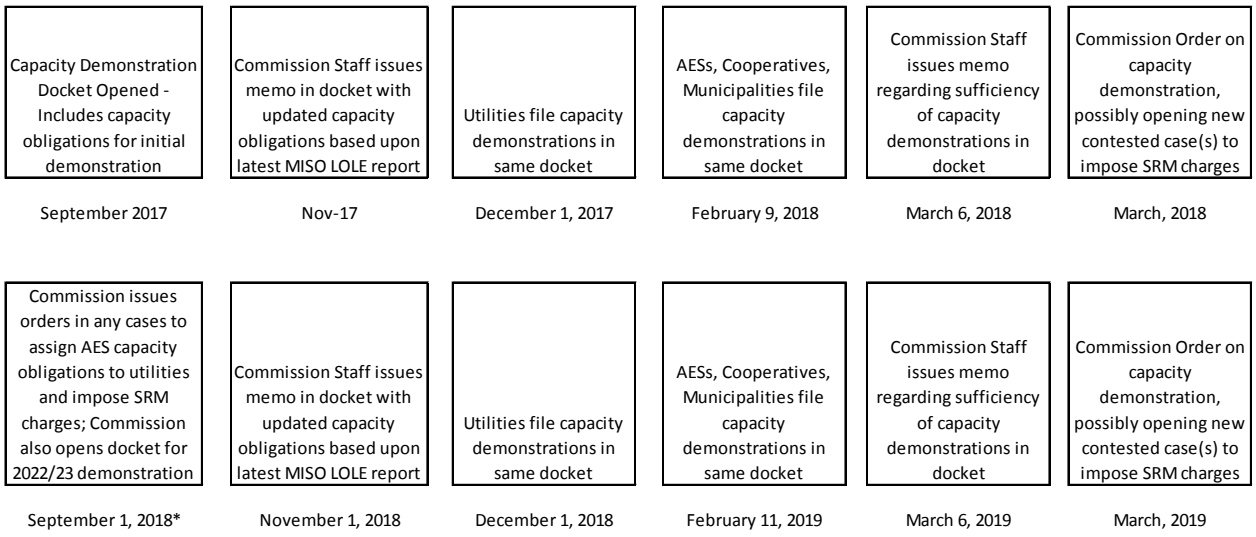
Kavita Kale, Executive Secretary

ATTACHMENT A: CAPACITY DEMONSTRATION PROCESS AND REQUIREMENTS

Capacity Demonstration Process



* process would repeat annually

One docket will be opened in the fall of 2017 for the initial capacity demonstrations for planning years 2018/19 through 2021/22. The Commission order opening the docket will provide requirements for LSEs to follow in making capacity demonstrations and include the capacity obligations to be applicable for 2018/19 through 2021/22.

The capacity demonstration obligations will be determined in a consistent and transparent manner. Based upon the most recently published LOLE study by MISO, the following data shall be utilized for capacity obligations for the initial capacity demonstration for planning years 2018/19 through 2021/22.[1]

The capacity demonstrations filed in this docket shall include four years of load obligations and owned or contracted resources, similar to the requests that the Commission has made in previous years. Each LSE's applicable capacity obligation will be based upon its most recent PRMR determination, as specified by MISO. For the initial four planning years, and then for every fourth planning year following the initial demonstration, the following minimum guidelines shall be utilized for the demonstration of planning resources.

[1] 2017 MISO LOLE Study, https://www.misoenergy.org/Library/Repository/Study/LOLE/2017%20LOLE%20Study%20Report.pdf, accessed 7/27/17.

For the purposes of the first demonstration for purposes of the SRM (Utilities filing in December 2017; AES/Municipals/Cooperatives filing in February 2018) the total capacity obligation shall be defined as follows:

LSE Capacity Obligation = (Aggregate PLC of LSE in 2018)*(PRM UCAP)[2]

Planning Year	2018/19	2019/20	2020/21	2021/22
PRM UCAP	7.5%	7.3%	7.3%	7.4%

Based on this formula, an LSE's total capacity obligation that it will be required to demonstrate that it has owned or contracted resources to satisfy will be based on its total 2018 peak demand for all four years of its demonstration. For years 2019 – 2021, the LSE's capacity obligation shall be equal to its 2018 peak demand plus the planning reserve margin projection for the applicable year, as specified in by MISO in its LOLE Study Report, and outlined in the table above.

The peak load contribution (PLC) determination for ROA customers should made through a cooperative process which is consistent with current MISO rules for dispute resolution. These PLC determinations will ultimately drive the total amount of capacity obligation that an AES will be required to meet in its annual demonstration before the Commission.

Based on comments received by MISO, the determination of the zonal LCR will be calculated as shown in the tables below:

MISO Zone 2					
Planning Year	**Peak Demand {1}**	**LRR UCAP per-unit of LRZ peak demand {2}**	**LRR ({1}*{3})**	**Capacity Import Limit {4}**	**LCR ({3}-{4})**
2017/18	12,982.0	111.7%	14,500.9	2,075	12,425.9
2018/19	14,006.0	111.8%	15,651.7	2,075	13,576.7
2019/20	15,030.0	111.8%	16,803.5	2,075	14,728.5
2020/21	15,030.0	112.1%	16,855.1	2,075	14,780.1
2021/22	15,030.0	112.5%	16,906.6	2,075	14,831.6
2022/23	15,030.0	112.8%	16,958.1	2,075	14,883.1
2023/24	15,030.0	113.2%	17,009.7	2,075	14,934.7
2024/25	15,030.0	113.5%	17,061.2	2,075	14,986.2
2025/26	15,030.0	113.9%	17,112.7	2,075	15,037.7
2026/27	15,030.0	114.2%	17,164.3	2,075	15,089.3

[2] PRM UCAP values by year as reported in the most recent MISO LOLE Study Report.

MISO Zone 7					
Planning Year	Peak Demand {1}	LRR UCAP per-unit of LRZ peak demand {2}	LRR ({1}*{3})	Capacity Import Limit {4}	LCR ({3}-{4})
2017/18	21,607.0	114.1%	24,653.6	3,320	21,333.6
2018/19	21,666.5	113.7%	24,624.0	3,320	21,304.0
2019/20	21,726.0	113.2%	24,593.8	3,320	21,273.8
2020/21	21,736.6	113.4%	24,652.4	3,320	21,332.4
2021/22	21,747.1	113.6%	24,711.0	3,320	21,391.0
2022/23	21,757.7	113.8%	24,769.6	3,320	21,449.6
2023/24	21,768.3	114.1%	24,828.3	3,320	21,508.3
2024/25	21,778.9	114.3%	24,887.0	3,320	21,567.0
2025/26	21,789.4	114.5%	24,945.8	3,320	21,625.8
2026/27	21,800.0	114.7%	25,004.6	3,320	21,684.6

For planning years 2018/19 through 2021/22, the zonal LCR will not be allocated to individual LSEs except as required by MISO in the administration of its tariff and business practices, as applicable. Any individual allocation of the zonal LCR for planning year 2022/23 and beyond will be established by the Commission at a future date.

Resource Demonstrations

Existing generation (owned)

The minimum acceptable support for existing generation that is included in a capacity demonstration include:

1) an affidavit from an officer of the company claiming ownership of the unit(s), including a commitment of the unit(s) to LSE load in the applicable Michigan zone four years forward,
2) a copy of the existing ZRC qualification of the unit(s) from the MISO Module E Capacity Tracking Tool, and
3) if there are retail tariffs or customer contracts associated with the resources, copies should be provided.

Existing demand response or energy efficiency resources (that have not been netted against load)

The minimum acceptable support for existing demand response resources or energy efficiency resources that have not already been netted against load include:

1) an affidavit from an officer of the company outlining the resource(s), including a commitment to maintain at least that same level of resources four years forward,
2) a copy of the existing ZRC qualification of the resource(s) from the MISO Module E Capacity Tracking Tool, and

3) if there are retail tariffs or customer contracts associated with the resources, copies should be provided.

New or upgraded generation (owned)

The minimum acceptable support for proposed new generation include:

1) an affidavit from an officer of the company outlining the detailed plans for the new generation including milestones such as planned in-service date, expected regulatory approval date(s), planned date to enter the MISO generator interconnection queue, expected date for MISO generator interconnection agreement, construction timeline, etc., and
2) documentation supporting the expected ZRC qualification from MISO for the new unit(s), and
3) if there are retail tariffs or customer contracts associated with the resources, copies should be provided.

For new generation submitted as part of a capacity demonstration, the Commission finds that all of the above data be updated and submitted on an annual basis with each subsequent capacity demonstration until the unit(s) are in service.

New demand response or energy efficiency resources (that have not been netted against load)

The minimum acceptable support for new demand response resources or energy efficiency resources that have not already been netted against load included in a capacity demonstration include:

1) an affidavit from an officer of the company outlining the plans for the resource(s), including a commitment to achieve and/or maintain at least that same level of resources four years forward, and
2) specific plans to have the resource(s) qualified by the independent system operator, and
3) if there are retail tariffs or customer contracts associated with the resources, copies should be provided.

For new demand response or energy efficiency resources submitted as part of a capacity demonstration, the Commission finds that all of the above data be updated and submitted on an annual basis with each subsequent capacity demonstration until the resource(s) are in service. Final qualification / approval from the independent system operator should be submitted in a subsequent demonstration.

Existing generation (capacity contract)

The minimum acceptable support for capacity contracts with existing generation include:

1) an affidavit from an officer of the company including a copy of the contract that specifies the unit(s) or pool of generation that is the source of the contract, including the location of the unit(s) or pool. The affidavit should include a commitment to maintain the contracted amount four years forward regardless of any early out clauses in the contract, and
2) a copy of the existing ZRC qualification of the unit(s) or pool from the MISO Module E Capacity Tracking Tool that the LSE obtains from the asset owner and includes with the demonstration filing.

Forward ZRC contracts

The minimum acceptable support for forward ZRC contracts include an affidavit from an officer of the company including a copy of the contract that specifies the zonal location of the ZRCs. The affidavit should include a commitment to maintain the contracted amount four years forward regardless of any early out clauses in the contract. A forward ZRC contract that does not specify the zonal location of the ZRCs will be deemed insufficient towards meeting any portion of a locational requirement, unless the LSE provides other alternative support for the location of the ZRCs.

PRA Purchases

The amount of ZRCs planned to be purchased in the MISO PRA that will be deemed prudent in an approved capacity demonstration will be limited to the following percentage of the LSE's total PRMR requirement.

Planning Year	2018/ 19	2019/ 20	2020/ 21	2021/ 22	2022/ 23	2023/ 24	2024/ 25	2025/ 26	2026/ 27
PRA Purchases (%)	N/A	5%	5%	5%	5%	5%	5%	5%	5%

Utilization of the MISO PRA in interim years

A capacity demonstration filed by an LSE that includes a plan to purchase ZRCs in the PRA four years in the future in excess of the allowable amounts outlined above, will not constitute a demonstration that the LSE owns or has contracted resources to meet its future capacity obligations.

Once the Commission has determined that the capacity demonstration made by an LSE is deemed to be sufficient, it shall not be re-litigated or "trued-up" in the interim years. If, subsequent to its initial satisfactory capacity demonstration, an LSE experiences an unforeseen significant outage at one of its generation assets, or has an unforeseen variation in its total load obligations, these matters will be settled in the PRA. The LSE's initial capacity demonstration will not be re-examined to reconcile projected interim year load obligations or generating resource capacity ratings with actual values that are experienced in that interim year.

Additional Considerations for Capacity Demonstrations

Other types of documentation submitted as part of a capacity demonstration will be evaluated on a case by case basis. While some of the documentation that is required to be filed in these proceedings is commercially sensitive, competitive information and should continue to be treated in a confidential manner, as has been done in the past. The Staff shall file a memo in the docket two weeks after the final capacity demonstrations are filed outlining its findings from the demonstration filings including a listing of any entities whose demonstration, in Staff's opinion, did not completely pass muster.

In the case where a demonstration filing does not pass Staff's muster, Staff would recommend that the Commission open a contested case docket, whereby the LSE in question could attempt to prove that its capacity demonstration should be deemed acceptable. The outcome of that case would be a

Commission order potentially authorizing SRM capacity charges to ROA customer load. Any contested demonstration cases will be opened as soon as practicable following the issuance of the Staff memo and be completed within six months.

If an LSE had met the capacity demonstration requirements, no contested case will be opened and no further action will be taken regarding any capacity demonstration that was deemed sufficient by Staff and accepted by the Commission.

Capacity Demonstrations for LSEs in PJM service territory

PJM Interconnection LLC (PJM) has a mandatory forward capacity market for LSEs in its service territory. LSEs in the PJM service territory meet their Independent System Operator capacity obligations either through participation in PJM's Reliability Pricing Model (RPM) Base Residual Auction (BRA) or through PJM's Fixed Resource Requirement (FRR) capacity plan. The PJM capacity market is a three year forward market with the calendar aligned slightly differently than what exists with the MISO capacity market. PJM's tariff requires FRR entities (those that self-supply capacity as Indiana Michigan Power has done since the inception of the RPM construct in 2007) to prove capacity for the 2021/22 delivery year (June 2021 through May 2022) in April 2018. The BRA will be completed in May 2018 for the 2021/22 delivery year.

The timing of PJM LSEs capacity demonstrations will remain the same as expected of MISO LSEs, however, PJM LSEs will be allowed to file an amended capacity demonstration two weeks after the completion of the PJM RPM BRA if the LSE participates in the BRA. The capacity demonstration should include the FRR capacity plan and/or BRA results. Meeting PJM's capacity obligations, including any applicable Percentage Internal Resources Required for the delivery year will constitute a satisfactory demonstration.

Demonstration Format

In addition to all of the items outlined above, the following forms shall also be utilized by the LSE in filing its demonstration.

Case No:
Utility: _____
Date: _____
Exhibit 3: Planning Resources

Planning Reserve Margin Requirements and Planning Resources to be Acquired (UCAP MW)

Line	(a)	Sample Calc.	(b) PY 2018-2019	(c) PY 2019-2020	(d) PY 2020-2021	(e) PY 2021-2022
1	Forecasted Bundled (or AES) Non-Coincident Peak Demand, MW (from Ex. 1 or Ex. 2)	11,111				
2	Internal Demand Response Programs that are applied as an adjustment to the Peak forecast, MW	11				
3	Adjusted Forecasted Bundled (or AES) Non-Coincident Peak Demand, MW (line 1 - line 2)	11,100				
4	Load Diversity Factor coincident to MISO, %.	98.00%				
5	Adjusted Forecasted Bundled (or AES) Coincident Peak Demand, MW (line 3 x line 4)	10,878				
6	Transmission Losses, %	2.80%				
7	Adjusted Total Peak Demand, MW (line 5 -(line 5 x line 6))	10,573				
8	Applied Transmission Losses, MW (line 5 x line 6)	305				
9	Adjusted Total Peak Demand, MW (same as line 7)	10,573				
10	Planning Reserve Margin % UCAP Basis	7.10%	7.50%	7.30%	7.30%	7.40%
11	Total Planning Reserve Margin Requirement (expected reserves), UCAP MW ((line 8 + line 9) x (1 + line 10))	11,650				
12	Company Owned, In-State, Non-Intermittent, MW	8,890				
13	Company Owned, Out-of-State, Non-Intermittent, MW	120				
14	Company Owned, In-State, Intermittent, MW	660				
15	Company Owned, Out-of-State, Intermittent, MW	100				
16	Total Company Owned Generation, MW (line 12 + line 13 + line 14 + line 15)	9,770				
17	Load Modifying Resources, Treated as Capacity, MW	420				
18	Applied Transmission Losses, MW (line 17 x line 6)	12				
19	Total Qualified Demand Response Resources including PRM_{UCAP}, MW ((line 17 + line 18) x (1 + line 10))	462				
20	PPA, In-State Intermittent Resource, MW	100				
21	PPA, Out-of-State Intermittent Resource, MW	200				
22	PPA, PURPA (BTMG), MW	26				
23	PPA, Intermittent (BTMG), MW	6				
24	Other Forward Capacity Contract, MW - In-State	220				
25	Other Forward Capacity Contract, MW - Out-of-State	0				
26	Total PPA, MW (line 20 + line 21 + line 22 + line 23 + line 24 + line 25)	552				
27	Total Planning Resources, MW (line 16 + line 19 + line 26)	10,784				
28	UCAP Surplus/(Shortfall), MW (line 27 - line 11)	(866)				

Case No: U-18197
Utility: _____
Date: _____
Exhibit 4: DR Program Resources

Demand Response - Capacity Resources

(a)	(b) Demand Response Program Name	(c) Demand Response Program (MW)	(d) Credit Transmission Losses and PRM $_{UCAP}$(MW)	(e) Total MW per Program Name
PY 2018-UCAP				
Total Demand Response - Capacity Resources PY 2017-2018 (MW)				
PY 2019-UCAP				
Total Demand Response - Capacity Resources PY 2018-2019 (MW)				
PY 2020-UCAP				
Total Demand Response - Capacity Resources PY 2019-2020 (MW)				
PY 2021-UCAP				
Total Demand Response - Capacity Resources PY 2020-2021 (MW)				

* Expand each planning year section as necessary to accommodate all DR programs that are used as capacity resources.

Case No: U-18197
Utility: _____
Date: ___
Exhibit 5: _____

Company Owned Electric Generation Resources

Line	(a) Electric Generation Unit Name	(b) Fuel or Renewable Type	(c) Specify: LRZ 2, LRZ 7, I&M, Other	(d) Located in Michigan (Y/N)	(e) If outside of MI, Contracted Trans Service (Y/N)	(f) P.A. 295 Resource (Y/N)	(g) ICAP (MW) 2018	(h) ICAP (MW) 2019	(i) ICAP (MW) 2020	(j) ICAP (MW) 2021	(k) UCAP (MW) 2018	(l) UCAP (MW) 2019	(m) UCAP (MW) 2020	(n) UCAP (MW) 2021
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* Add rows to accommodate all generating units as necessary.
* Please use UCAP data for ICAP columns for run-of-river hydroelectric power, wind power and solar power resources.

Case No: U-18197
Utility: _____
Date: ___
Exhibit 6: _____

Generation Resources Under PPA or Other Capacity Contract

Line	(a) Electric Generator Name	(b) Fuel or Renewable Type	(c) Specify: LRZ 2, LRZ 7, I&M, Other	(d) Located in Michigan Y/N	(e) PA 295 Y/N	(f) PA 295 BTMG Y/N	(g) PURPA Y/N	(h) Other Bilateral PPA Y/N	(i) ICAP MW Contracted 2018	(j) ICAP MW Contracted 2019	(k) ICAP MW Contracted 2020	(l) ICAP MW Contracted 2021	(m) UCAP MW Contracted 2018	(n) UCAP MW Contracted 2019	(o) UCAP MW Contracted 2020	(p) UCAP MW Contracted 2021
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* Add rows to accommodate all generating units as necessary.

* Please use UCAP data for ICAP columns for run-of-river hydroelectric power, wind power and solar power resources.